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Supreme Court, U.S.
FILED

No. 98 737 OCT 28 1998

OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

JONATHAN W. MARSHALL, et al.,

Petitioners,

v.

RONALD SUSTER, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BETTY D. MONTGOMERY
Attorney General
MICHAEL J. RENNER
Chief Counsel
Counsel of Record
ELISE W. PORTER
Assistant Attorney General
Office of the Attorney General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 644-8903
(614) 466-5087 (fax)

Counsel for Petitioners

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QUESTIONS PRESENTED

I. WHETHER THE SIXTH CIRCUIT ERRED BY REVIEWING THE LAW AS IT EXISTED AT THE TIME THE LAWSUIT WAS FILED, RATHER THAN THE AMENDED VERSION EFFECTIVE AT THE TIME OF THE APPELLATE COURT'S REVIEW.

II. WHETHER, CONSISTENT WITH THIS COURT'S RULING IN *BUCKLEY V. VALEO*, 424 U.S. 1 (1976), REASONABLE, POPULATION-BASED LIMITATIONS ON CAMPAIGN SPENDING IN JUDICIAL ELECTIONS ARE NARROWLY TAILORED TO SERVE THE COMPELLING STATE INTERESTS OF THE PRESERVATION OF IMPARTIALITY AND THE APPEARANCE OF IMPARTIALITY OF THE JUDICIARY, OR, IN THE ALTERNATIVE, WHETHER THE STANDARD ARTICULATED IN *BUCKLEY* IS INAPPROPRIATELY APPLIED TO JUDICIAL CAMPAIGNS.

LIST OF PARTIES

APPELLANTS (PETITIONERS):

Jonathan Marshall	Secretary of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court ("Board")
Robin Weaver	Chair of the Board
David T. Evans	Vice Chair of the Board
Thomas J. Moyer	Chief Justice of the Ohio Supreme Court
Andrew Douglas	Justice of the Ohio Supreme Court
Alice Robie Resnick	Justice of the Ohio Supreme Court
Francis E. Sweeney	Justice of the Ohio Supreme Court
Paul E. Pfeifer	Justice of the Ohio Supreme Court
Deborah L. Cook	Justice of the Ohio Supreme Court
Evelyn L. Stratton	Justice of the Ohio Supreme Court

APPELLEES (RESPONDENTS):

Ronald Suster	Judge, Cuyahoga County Common Pleas Court; judicial candidate, 1996
Patricia Cleary	Judge, Cuyahoga County Common Pleas Court; judicial candidate, 1996
Jack Durkin	Judge, Mahoning County Common Pleas Court; judicial candidate, 1996
Robert Lisotto	Judge, Mahoning County Common Pleas Court; judicial candidate, 1996
Beth Smith	Judge, Mahoning County Common Pleas Court; judicial candidate, 1996
Gail Rose Kane	former Judge, Cuyahoga County Common Pleas Court; judicial candidate, 1996
Christopher A. Boyko	Judge, Cuyahoga County Common Pleas Court; judicial candidate, 1996
Stuart Seferin	former Judge, Cuyahoga County Common Pleas Court; judicial candidate, 1996
Timothy Maloney	Judge, Mahoning County Common Pleas Court; judicial candidate, 1996

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The Decision of the United States Court of Appeals for the Sixth Circuit, entered July 30, 1998, is reported. *Ronald Suster et al. v. Jonathan W. Marshall, et al.*, 149 F.3d 523 (1998). Appendix, p. 1 ("A-1"). The six orders of the United States District Court for the Northern District of Ohio, Eastern Division from which appeals were taken in this case are unreported. *Ronald Suster et al. v. Jonathan Marshall, et al.*, 96 CV 1736, orders of September 10, 1996 (A-70), September 25, 1996 (A-66 and A-40), October 22, 1996 (A-30), November 25, 1996 (A-28) and January 27, 1997 (A-27).

JURISDICTIONAL STATEMENT

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on July 30, 1998. (A-1). Jurisdiction exists under 28 U.S.C. section 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Former Canon 7 of the Code of Judicial Conduct of the Ohio Supreme Court:

CANON 7

JUDGES AND JUDICIAL CANDIDATES SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO JUDICIAL OFFICE

(C) Campaign Solicitations and Expenditures.

* * *

(6)(a) The total amount of expenditures made in the fund raising period allowed by division (C)(4) of this canon by the campaign committee of a judicial candidate shall not exceed the following:

* * *

(iv) Seventy-five thousand dollars in the case of a judicial candidate for a court of common pleas;

(v) Fifty thousand dollars in the case of a judicial candidate for municipal court, or county court.

Current Canon 7 of the Code of Judicial Conduct of the Ohio Supreme Court:

CANON 7

JUDGES AND JUDICIAL CANDIDATES SHOULD REFRAIN FROM POLITICAL ACTIVITY INAPPROPRIATE TO JUDICIAL OFFICE

(C) Campaign Solicitations and Expenditures.

* * *

(6)(a) Except as provided in division (C)(6)(b) of this canon, the total amount of expenditures made in the fund raising period allowed by division (C)(4) of this canon by the campaign committee of a judicial candidate shall not exceed the following:

* * *

(iv) One hundred twenty-five thousand dollars in the case of a judicial candidate for a court of common pleas, municipal

court, or county court that serves a territorial jurisdiction with a population of more than seven hundred fifty thousand;

(v) One hundred thousand dollars in the case of a judicial candidate for a court of common pleas, municipal court, or county court that serves a territorial jurisdiction with a population of more than two hundred fifty thousand but not more than seven hundred fifty thousand;

(vi) Seventy-five thousand dollars in the case of a judicial candidate for a court of common pleas, municipal court, or county court that serves a territorial jurisdiction with a population of more than one hundred thousand but not more than two hundred fifty thousand;

(vii) Fifty thousand dollars in the case of a judicial candidate for a court of common pleas, municipal court, or county court that serves a territorial jurisdiction with a population of one hundred thousand or less.

First Amendment to the United States Constitution:

Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition toe Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution:

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case is about the failure of the Sixth Circuit to recognize, as a compelling state interest, a fundamental foundation of our democratic system -- the impartiality of the judicial system. In a country based upon the rule of law, there can be no more compelling state interest than the establishment and maintenance of a judiciary free from the appearance of partiality. The courts are, after all, the last resort for Americans to correct injustice caused by unfair bias in other branches of government. This is a particularly important issue to the country and the legal community at this time, as the American Bar Association prepares to consider the Report and Recommendation of its Task Force on Lawyer's Political Contributions ("ABA Report"), which includes extensive sections discussing the elected judiciary, but specifically reserves comment on limits on campaign expenditures pending the outcome of this case. ABA Report, p. 23, n. 37. The Ohio Supreme Court adopted a Code of Judicial Conduct, including Canon VII(C)(6)(a) at issue here, in order to enact a narrowly tailored means to preserve public confidence in the integrity and impartiality of the State's elected judiciary.

In 1992, the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court created a subcommittee to undertake a comprehensive review of the Ohio Code of Judicial Conduct. The next year, an Ad Hoc Committee was created by the Ohio State Bar Association to review campaign finances of the Ohio Supreme Court. Both committees recommended, among a number of suggestions, that campaign spending limits be placed on judicial candidates. Reports of both committees were submitted by Petitioner Chief Justice Moyer to a Special Committee for review. The Special Committee, in addition to reviewing the reports, authorized a public opinion poll regarding the perception of influence and partiality in the State judiciary. That poll indicated that limits on

campaign expenditures would help improve public respect for judicial elections and judges in Ohio, and help eliminate the appearance of bias in the public's eye.

After this extensive examination of the issue of public confidence in the judicial system, the Ohio Supreme Court made a number of changes to the Code of Judicial Conduct. Among other things, a limit on campaign spending was considered a remedy that would enhance impartiality in the Ohio justice system, as well as foster the appearance of judicial neutrality throughout the State. To this end, the Ohio Supreme Court promulgated, among many other reforms, Canon VII(C)(6), which limits the amount a judicial candidate can spend on his campaign for an elected judgeship in Ohio.

On August 9, 1996, Respondents Ronald Suster ("Suster") and Patricia Cleary ("Cleary"), judges on the Cuyahoga County Common Pleas Court, filed suit seeking declaratory and injunctive relief from enforcement of Canon VII(C)(6)(a). Suster was seeking election in November 1996 while Cleary's term is scheduled to end on December 31, 2000. Respondents filed suit against the Secretary and the Chair of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court ("Board") and against all the individual Justices of the Ohio Supreme Court.

Respondents sought to have Canon VII(C)(6)(a) declared unconstitutional and to enjoin its enforcement. At the time of the original lawsuit, Canon VII(C)(6)(a) prohibited a candidate running for Ohio Common Pleas Judge from spending more than seventy five thousand dollars ($75,000) during the campaign.

Respondents contend that Canon VII(C)(6)(a) violated their free speech rights because Suster wished to spend more than the cap amount in his campaign and both Suster and Cleary

wished to hear as much speech as possible from candidates for the Cuyahoga County Common Pleas bench.

The district court denied Respondents' request for a temporary restraining order. It conducted a hearing and issued a partial preliminary injunction. The court found that there was a strong likelihood that Respondents would succeed in establishing that Canon VII(C)(6)(a) was unconstitutional, and enjoined enforcement against all judicial candidates. (A.-70) Petitioners appealed to the Sixth Circuit.

After receiving the September 10 order, Respondents filed a motion to stay the order pending an appeal to the Court of Appeals. The trial court instead modified its original order. (A-40) Under the modified injunction, the Ohio Supreme Court was prohibited from enforcing Canon VII(C)(6)(a) against Judges Suster and Cleary only. Suster and Cleary filed a Notice of Cross-Appeal.

In October and November of 1996, additional individuals filed motions to intervene as plaintiffs and for preliminary injunction. The court granted the motions to intervene and granted preliminary injunctions in favor of the intervenors. (A-30) Because of the long series of orders issued by the district court, Petitioners filed five notices of appeal to the Sixth Circuit. All of these appeals were consolidated.

Before the Sixth Circuit heard the case, and indeed before briefing was complete, the Supreme Court of Ohio amended Canon VII (C)(6). The Canon continues to place limitations on expenditures for judicial candidates but those limitations for common pleas judges are now population-based.

On appeal, the Sixth Circuit first correctly held that it could not review Canon VII(C)(6)(a) as it existed at the time the suit was filed, but must review the law as it stands now. But,

having made that acknowledgment, the court remanded the amended Canon VII(C)(6)(a) to the district court for consideration. Curiously, the Sixth Circuit then proceeded to analyze the original Canon, the one which the court itself had said was no longer subject to review.

The court below analyzed the original Canon under the "strict scrutiny" standard of review used in *Buckley v. Valeo*, 424 U.S. 1 (1976) and progeny. The Sixth Circuit disregarded Petitioner's arguments that judicial officers are different from political officers, and in performing the *Buckley* analysis incorrectly stated that the prevention of corruption is the *only* "compelling state interest" permitted when analyzing restrictions on campaign finance. Having incorrectly determined that the prevention of corruption or the appearance of corruption is the only compelling state interest possible for the analysis, the Sixth Circuit went on to hold that Cannon VII (C)(6)(a) is not narrowly tailored to serve that interest, and is therefore unconstitutional and may be enjoined.

REASONS FOR GRANTING THE WRIT

The lower courts in this case neglected a fundamental principle of the American political structure: judges are different. For all other elected offices, impartiality is unnecessary, and indeed discouraged. Voters have a right to elect representatives biased toward their viewpoints. But with judges, political issue bias is unwelcome and contrary to fundamental due process. In declining to recognize the State's compelling interest in preserving judicial impartiality and the appearance thereof, the Sixth Circuit cited decisions from this Court which considered only non-judicial elections. To allow the Sixth Circuit decision to stand is to blur historic and important distinctions between the judiciary and every other elected office in our constitutional system.

This issue is vital to the entire legal community, and particularly timely; the American Bar Association's Task Force on Lawyers' Political Contributions, in its Report and Recommendations has specifically refrained from dealing with the issue of spending limitations in judicial races pending the outcome of this particular litigation. ABA Report, p. 23, n. 37.

In addition, the court below correctly stated that it should review the law as it stood at that time, amended Canon VII (C)(6)(a). However, it then remanded the amended Canon, and proceeded to review and reject the original, unamended version of the Canon in such a way as to preclude a "full review" of the new Canon by the lower court, by making erroneous fundamental constitutional pronouncements which preclude any real analysis by the district court. Because the Sixth Circuit's failure to review the current law diverges from numerous decisions of this Court and is in conflict with holdings from other courts, it warrants prompt review.

I. THE SIXTH CIRCUIT ERRED IN REMANDING THE AMENDED CANON FOR "A FULL REVIEW," WHILE SIMULTANEOUSLY RESTRAINING SUCH A REVIEW BY ISSUING AN ERRONEOUS CONSTITUTIONAL OPINION ON THE ORIGINAL CANON.

The court below remanded the amended Canon for a "full review" by the district court, while simultaneously issuing an opinion regarding the former Canon that prevents the district court from exercising any real discretion in its analysis. The Court should take this case to establish that such actions are incompatible with well-established precedent and judicial economy. The Court should review the merits of the case under the law as it stands today, or at least vacate the Sixth

Circuit opinion, in order to allow the district court genuine discretion in its review of the amended Canon.

When a law is amended after entry of judgment in the trial court, but before the decision of the appellate court, the appellate court, in considering a facial challenge to a state law, *must* "review the judgment of the district court in light of [the] law as it now stands, not as it stood when the judgment below was entered." *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972). If the amendment so changes the nature of the dispute as to render the appeal moot, the established practice is to vacate or reverse the judgment below and remand with a direction to dismiss. *Arizonans for Official English v. Arizona*, 520 U.S. ___, 137 L.Ed. 2d 170 (1997); *Diffenderfer*, 404 U.S. at 414; *United States v. Munsingwear*, 340 U.S. 36, 39, (1950). If the change in law requires additional factual findings or legal analysis, the case is sometimes remanded for further review. *Fusari v. Steinberg*, 419 U.S. 379, 387 (1975); *Thorpe v. Housing Authority*, 386 U.S 670 (1967); 393 U.S. 268, 272-783 (1969). But if the amendment does not make substantial changes, the appellate court will review the law as it now stands. *Florida General Contractors v. Jacksonville*, 508 U.S. 656, 661-63, n. 3. (1993), *City of Mesquite v. Aladdin's Castle*, 455 U.S. 283, 288-89 (1982). In no case has this Court simultaneously reviewed a former law and remanded the new one for review, nor has it permitted a circuit court to do so.

Here, the amended Canon has the essential feature relevant to the Sixth Circuit's holdings on the original Canon: a cap on campaign spending. Indeed, the only difference between the former Canon and the amended Canon is a population-based graduated scale in the amounts of spending allowed for candidates for the common pleas and municipal courts. The change requires no new findings of fact or legal arguments; indeed, the parties' arguments would be essentially unchanged

on remand. The Sixth Circuit correctly determined that this small change in the law did not moot the controversy.

The proper course of action for the Sixth Circuit should have been to review the Canon as it appears now. However, after correctly stating the law, the Sixth Circuit ignored it. The bizarre splitting of a facial constitutional challenge into the "old" and "new" versions of the law goes against numerous holdings of this Court, and is contrary to virtually all the circuit law on the issue.

The case most illustrative of the split in the circuits on this issue is *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996). In a situation virtually identical to this one, the Eighth Circuit was faced with a statute establishing a voluntary state campaign financing scheme. After the case was submitted to the Court of Appeals, the Minnesota legislature amended the statute, altering the operation of the waiver provision in the statute. The court correctly determined that it should review the law as it stood at the time, not as it was when the lower court reviewed it. The Eighth Circuit determined that the case had not been mooted, and reviewed the new statute, despite the fact that the amendment took place after briefing and oral argument. Here, there was an opportunity to brief the new law and address its constitutionality *during* oral argument. *See, also, Sanjour v. EPA*, 56 F.3d 85 (D.C. Cir. 1994)(new law reviewed); *Naturist Society v. Fillyaw*, 958 F.2d 1515, 1519-20 (11th Cir.1992)(case not moot, new law reviewed); *Coral Construction Co. v. King County*, 941 F. 2d 910 (9th Cir. 1991)(one issue reversed and remanded for further review, one issue reviewed under new law) .

In addition to contradicting the law in other circuits, the Sixth Circuit's decision contradicts a long line of decisions in this Court. *Arizonans for Official English; Florida General Contractors; Diffenderfer v. Central Baptist Church*, 404 U.S.

412, 414 (1972); *Goodman v. Lukens Steel*, 482 U.S. 656, 662 (1987); *Hall v. Beals*, 396 U.S. 45, 48 (1969); *Thorpe v. Housing Authority*, 393 U.S. 268, 281-282 (1969); *United States v. Alabama*, 362 U.S. 602, 604 (1960); *Hines v. Davidowtiz*, 312 U.S. 52, 60 (1941); *Carpenter v. Wabash R. Co.*, 309 U.S. 23, 26-27 (1940); *United States v. Schooner Peggy*, 1 Cranch 103, 110 (1801).

Nor is this a mere procedural problem. There are important, principled and practical reasons for the rule. In this case every meaningful legal issue regarding the analysis of the amended Canon has been determined in the Sixth Circuit's analysis of the former Canon. Unless the Sixth Circuit's judgment is an impermissible advisory opinion, *Muskrat v. United States*, 219 U.S. 346 (1911), the district court is bound by it as precedent, or at least the law of the case. The district court therefore has no meaningful discretion: it must find the amended Canon unconstitutional, without being able to address the real issues: (1) did the new Canon permissibly protect a compelling state interest in the impartiality and appearance of impartiality of the state's judiciary, and (2) is the new Canon sufficiently narrowly tailored to protect that compelling state interest?

It cannot be said that the Sixth Circuit's split of the constitutional analysis was necessary in order to protect the original plaintiffs and intervenors from potential discipline under the old Canon. The court below, consistent with precedent, could have retained and reviewed the rights of plaintiffs and intervenors by analyzing the new Canon, or could have remanded the entire case to the district court for analysis unfettered by the Sixth Circuit's conclusions.

Even worse, the litigants are unnecessarily frustrated in their desire to have the constitutionality of the Canon determined. The parties in this case are forced to litigate (and

pay for) an "analysis" by the district court that is no analysis at all. In order to have full review of the constitutionality of the Canon, the litigants must once again appeal to the Sixth Circuit, also constrained by precedent and the "law of the case" to find the amended Canon unconstitutional. Only then can the litigants reach review by this Court. Such a result is a waste of state, private and judicial resources, as well as being contrary to the case law. This approach, contrary to both law and logic, locks the Ohio judicial election process into a limbo for which no higher court review of the crucial First Amendment questions can be achieved for years. The Sixth Circuit should have reviewed the new Canon.

The Court should take this case to overrule the Sixth Circuit's actions, and review the law as it stands now. In the alternative this Court should vacate the Sixth Circuit's review of the former Canon as an advisory opinion, and allow the district court complete discretion in its analysis of the amended Canon.

II. STATES HAVE COMPELLING STATE INTERESTS IN THE IMPARTIALITY OF AND THE APPEARANCE OF IMPARTIALITY OF THEIR ELECTED JUDICIARY.

> When considering whether a campaign finance law unconstitutionally infringes freedom of speech, this Court's task is to decide whether the provision in question actually burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest.

Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657 (1990)(citing *Buckley*, 424 U.S. at 25).

The "compelling state interest" put forward by the government in *Buckley* was the prevention of corruption or the appearance of corruption in the election of federal executive and legislative officers. However, this Court has never held that interest is the only one available to a government when it establishes laws that "have the effect of curtailing" the freedom of speech or association. *Buckley*, 424 U.S. at 25. *Buckley* did not consider the far different institution of the judiciary and the different interest the State has in the electoral process for judges.

A. The Decision Below Ignores the Possibility of a Compelling State Interest other than that Considered in *Buckley*.

The Court should take this case to eradicate the misconception by the Sixth Circuit that the only "compelling state interest" possible in the analysis of restrictions on campaign expenditures is the one recognized in *Buckley*. The Sixth Circuit ignored the language of the Canon itself, as well as arguments by counsel for the Ohio Supreme Court for a compelling state interest in the impartiality of the States' elected judiciary. The court below presented no reasoning at all for its holding on this issue, which is the very heart of the case.

The Code of Judicial Conduct of the Supreme Court of Ohio has as its primary purpose the integrity, independence, and impartiality of the judiciary of Ohio. All of the Canons are aimed at preserving the integrity, independence and impartiality of the judiciary. *See*, Canon I ("A Judge Shall Uphold the Integrity and Independence of the Judiciary,"); Canon II ("A Judge Shall Respect and Comply With the Law and Shall Act at all Times in a Manner That Promotes Public Confidence in the Integrity and Impartiality of the Judiciary"), Canon III ("A Judge Shall Perform the Duties of Judicial Office Impartially and

Diligently"), Canon IV ("A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge's Activities"). The provisions of Canon VII dealing with judicial elections were therefore promulgated for that purpose. The Sixth Circuit should have analyzed Canon VII (C)(6) using the purpose put forward by the Canons themselves, and not using the purpose put forward in *Buckley*.

In addition to ignoring the stated purpose of the Canons, the Sixth Circuit misstated the Court's holdings with regard to "compelling state interests" by holding that the interest put forward in *Buckley* is "*the only interest* compelling enough to infringe upon the First Amendment rights of a candidate." A-19 (citing *FEC v. NC-PAC*, 470 U.S. 480, 496-497(1985)) (emphasis added). However, this Court actually stated that:

> preventing corruption or the appearance of corruption are the only legitimate and compelling government interests *thus far identified* for restricting campaign finances.

NC-PAC, 470 U.S. at 496-497(emphasis added). Thus, this Court's cases leave open the possibility that other state interests, heretofore unidentified, may be "compelling" for purposes of restricting campaign finances. The obvious reason that the compelling state interests in the impartiality and appearance of impartiality of the judiciary are not interests "thus far identified," is that no case evaluating campaign expenditure limitations in *judicial* races has yet been heard by this Court.

B. The Preservation of the Impartiality and the Appearance of Impartiality of the State Judiciary are Compelling State Interests.

We the people expect candidates for political office to advocate strong, partisan positions, and indeed vote for those candidates who most closely reflect our own biases, viewpoints and positions. On the other hand, we expect our judges to be impartial and neutral. When judges are elected, as they are in Ohio and some other States, we expect them to display a neutral and unbiased attitude, and we vote for those candidates who most closely reflect this attitude. Such a neutral attitude goes beyond the lack of corruption. While corruption is part of the category of improper judicial bias, a judge can be biased without being corrupt. Because of the legitimate expectation that judges will be unbiased, the States have a compelling interest in the preservation of judicial impartiality and the appearance of judicial impartiality.

Of course, a candidate for any elective office, including for the judiciary, is in some sense "political." But a judicial candidate does not participate in the same robust political debate engaged in by a candidate for an executive or legislative position. The same public issues discussed in open political debate can and often do eventually come before the judiciary, and, for the judicial system to work, the parties must not feel that the judiciary is prejudiced. That is why judges and judicial candidates are not expected to engage in, and indeed are forbidden from, the "uninhibited, robust and wide open" (*New York Times v. Sullivan*, 376 U.S. 254, 270 (1964)) debate of political issues:

> Although the political elective process for the judiciary makes judicial candidates political party candidates, they are not as others. . . . They

> are, in short, to be as non-partisan as the selection of Judges by election permits.

Rosenthal v. Harwood, 35 N.Y. 2d 469, 473; 323 N.E.2d 179, 182 (1974). *See, also, Buckley v. Judicial Inquiry Board*, 997 F.2d 224, 228 (7th Cir.1993)(Posner, J.)("[j]udges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."); *Ackerson v. Kentucky Jud. Ret. & Removal Comm'n.*, 776 F. Supp. 309, 313 (W.D. Ky. 1991)("Because the judicial office is different in key respects from other offices, the state may regulate its judges with the differences in mind.").

Indeed, the American Bar Association itself recognizes the unique qualities of an elected judiciary. In its Report and Recommendations, the Task Force on Lawyers' Political Contributions has a lengthy discussion about the differences between judges and other elected officials. ABA Report, p. 4 & ff. The lengthy discussion begins with the statement:

> Any aspect of judicial elections begins with one over-riding fact: these elections are uniquely different from all other elections.

ABA Report, p. 4. *See, also*, Hansen, *A Run for the Bench*, ABA Journal, October 1998, p. 68-72. Although recognizing this important difference, the ABA has specifically withheld consideration of specific limitations on campaign spending pending the outcome of this case. ABA Report, p. 23, n. 37.

Pennsylvania has not been so reticent. The Supreme Court of Pennsylvania appointed a Special Commission to Limit Campaign Expenditures. In its Report ("Pa. Report"), issued this past March, the Commission recommends limits on

campaign spending for the elected judiciary, in spite of "the apparent conflict with" *Buckley*. Pa. Report, p. 19.

In Ohio, as elsewhere, judges and judicial candidates are expressly forbidden from engaging in political speech and association. Ohio's Canons III and VII (B), based on canons in the Model Code of Judicial Conduct, specifically and properly forbid judicial candidates from engaging in a wide range of associational and speech activities. The Canons indicate a deeply-held conviction by the public and the judiciary itself that candidates for judicial office should be and are held to standards quite different from those for candidates for political office.

Nor is a prohibition on certain types of political speech and activity for certain government officers unique. This Court has held that classified employees of the federal government may be prohibited from a variety of political speech and activity. *United States Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973). Members of the Armed Forces may be prohibited from expressing religious beliefs in certain ways, *Goldman v. Weinberger*, 475 U.S. 503 (1986). Indeed, attorneys and physicians, as well as many other professionals must accept some restrictions on their First Amendment freedoms that are different from restrictions on other American citizens.

The prohibition on certain types of judicial speech is vitally necessary to preserve impartiality and the appearance of impartiality in the judiciary. If a judge or judicial candidate were allowed unrestricted speech, he or she would be free to comment on cases and issues on the current docket, or that might come before the judge in the near future. Such comments would indicate that the judge's mind is made up before the evidence is in. Rather than being an independent arbiter, the judge will have become a partisan participant in the dispute.

For these reasons, the State's interests involved in the regulation of campaign speech for political office and judicial office are distinctly different. In contrast to the governmental interest outlined in *Buckley*, the preservation of the impartiality and the appearance of impartiality of the judiciary is a broader requirement and commands a more rigorous curtailment of speech and association on the part of judges and judicial candidates.

C. The Sixth Circuit Decision Conflicts With Decisions From Numerous Courts That Have Recognized the Impartiality and the Appearance of Impartiality of the Judiciary as Vital State Interests.

Although the issue of limitations on spending in judicial elections is one of first impression, there is a clear split in the lower courts on the issue of whether there is a compelling state interest in the impartiality and the appearance of impartiality in the judiciary. The Court should take this case to resolve the split of authority on this issue, and affirm that the impartiality of the judiciary is a "compelling state interest" for purposes of First Amendment analysis.

Numerous courts from around the country have recognized an important, indeed critical, state interest in the preservation of impartiality in the judicial branch:

> Courts have repeatedly expressed the importance of an impartial judiciary: "[o]ne of the fundamental rights of a litigant under our judicial system is that he is entitled to a fair trial in a fair tribunal, and that fairness requires an absence of actual bias or prejudice in the trial of the case." *United States v. Wade*, 931 F.2d 300,

> 304 (5th Cir. 1991)(quoting *United States v. Brown*, 539 F. 2d 467, 469 (5th Cir. 1976)).

The state courts have been particularly adamant about an interest in impartiality, especially when dealing with judicial elections:

> "[An interest in the impartiality of the judiciary] extends to properly conducted judicial elections as the perception of judicial partiality and corruption which can arise from improperly run judicial campaigns whether true or not, breeds disrespect for the law and ultimately encourages extralegal self-help."*In re Hopewell*, 507 N.W.2d 911, 916 (S.D. 1993).

See, also, Rosenthal v. Harwood, 35 N.Y. 2d 469, 473; 323 N.E.2d 179, 182 (1974)(although candidates for elective office, judicial candidates have important restrictions on speech and association); *Ackerson v. Kentucky Jud. Ret. & Removal Comm'n.*, 776 F. Supp. 309, 313 (W.D. Ky. 1991)("The judicial office is different in key respects from other offices"); *Breakstone v. Mackenzie*, 561 So.2d 1164, 1168 (Fla. App. 3d District 1989)(interest in impartiality of judiciary a particularly important interest to the State).

The federal courts have also recognized the importance of an impartial judiciary, and that it can comprise a compelling state interest:

> Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech." *Buckley v. Judicial Inquiry Board*, 997 F.2d 224, 228 (7th Cir.1993)(Posner, J.).

"There can be no question, . . . that a state has a compelling interest in the integrity of its judiciary." *Stretton v. Disciplinary Bd. of the Supreme Court of Pennsylvania*, 944 F.2d 137 (3d Cir. 1991)(Weis, J.). *See, also, Haffey v. Taft*, 803 F. Supp. 121, 125-26 (S.D. Ohio 1992)(Kinneary, J.)(State's asserted interest to "keep politics out of the general judicial election" considered "sincere," and sufficient to justify requirement of nonpartisan ballot); *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69, 75 (S.D. Ohio 1984)(Duncan, J.) ("[T]he state has a compelling interest in assuring that its elected judges are protected from untruthful criticism and that judicial campaigns are run in a manner so as not to damage the actual and perceived integrity of state judges and the bar"); *Morial v. Judiciary Comm'n*, 565 F.2d 295, 307 (5th Cir. 1977)(Because the state has an interest "in preventing . . . judicial impropriety," a statute requiring a judge to resign before becoming a candidate for a non-judicial office is constitutional.)

Indeed, this Court has stated on more than one occasion (although in contexts other than caps on judicial spending) that a State has a compelling interest in the integrity and impartiality of its judiciary: "A State may also properly protect the judicial process from being misjudged in the minds of the public." *Cox v. Louisiana*, 379 U.S. 559, 565 (1965); "[t]here could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978)(Stewart, J., concurring).

The Sixth Circuit emphasized that the record contained no evidence that limiting expenditures in fact increases judicial impartiality. However, the court missed the point that preserving the appearance of impartiality is also a compelling state interest. Even if there is a lack of evidence that campaign spending limits increase judicial impartiality, there is evidence that such limits improve the public percention of impartiality.

In short, Canon VII(C)(6)(a) is a reasonable and narrowly tailored restriction that promotes a compelling state interest.

It is imperative for the Court to establish that governmental interests other than the one recognized in *Buckley* are available to States when legislating with regard to restrictions on campaign finance. The preservation of the impartiality and the appearance of impartiality of the judiciary is a state interest well-recognized by numerous courts. The Sixth Circuit chose to ignore this well-established interest when analyzing Canon VII (C)(6). This Court should take this case to clear the conflict and affirm that interest as one which allows appropriately-tailored limitations on speech.

III. CANON VII(C)(6)(a) IS NARROWLY TAILORED TO SERVE THE COMPELLING STATE INTERESTS OF THE PRESERVATION OF THE IMPARTIALITY AND THE PERCEPTION OF IMPARTIALITY IN THE ELECTED JUDICIARY.

Canon VII (C)(6)(a) is narrowly tailored to serve the compelling state interests of the preservation of the impartiality and the appearance of impartiality of the judiciary for a number of reasons. Canon VII(C)(6) does not limit the content of advertising a candidate wishes to engage in. It also does not limit the viewpoint of any judicial candidate. In fact, the challenged Canon does not limit the type of speech in any manner, although other Canons, not at issue here, do so.

The reasonable limit on spending is graduated according to the office sought and the population served by the office being sought. For common pleas, municipal court and county courts, the amended Canon allows a candidate to spend more in jurisdictions with larger populations.

"Unlimited expenditures tend to result in negative campaigning and circus advertising, which does nothing more than demean the position of judge." Pa. Report, p. 23 (testimony of Luzerne County, Pennsylvania, Bar President Joseph Persico). The Canon promotes impartiality and the appearance of impartiality of the judiciary by subduing the frenzy of slick advertisements on television and in other media that accompany political campaigns, while allowing candidates sufficient funds to advertise their qualifications for office. This in turn lessens the appearance that judicial candidates are politicians, and allows a more focused debate on the only appropriate issue for judicial campaigns: the legal and judicial qualifications of the candidates.

The Court should take this case to correct the grievous error by the Sixth Circuit in failing to recognize vital interests of the impartiality and the appearance of impartiality of the judiciary, and that they can justify limits on spending for judicial candidates.

IV. IF THE SIXTH CIRCUIT CORRECTLY INTERPRETED *BUCKLEY*, THEN THE STANDARD USED IN *BUCKLEY* SHOULD BE RECONSIDERED IN ITS APPLICATION TO JUDICIAL RACES.

If the Sixth Circuit is correct in its interpretation of *Buckley*, then the circumstances of this case merit the Court's reconsideration of the "strict scrutiny" standard of review used in *Buckley*, at least insofar as judicial races are concerned. Because of the different nature of judicial races, the application of only one compelling state interest, and the strict scrutiny analysis of *Buckley*, is too heavy a burden. The States are trying to maintain the appearance of judicial impartiality in an arena with exponential growth in the costs of election campaigns. In light of the special circumstances of promoting the appearance

of judicial impartiality and the skyrocketing expenditures in judicial elections, the fundamental reasoning of *Buckley* should be revisited to establish a judicial exception.[1]

---

[1] If *Buckley* stands for the principle that all limits on campaign spending are unconstitutional, then this Court should revisit *Buckley* in its entirety, and overrule it. Nor is this the only case in which the Court will face challenges to the holding in *Buckley*. *See, City of Cincinnati v. Kruse*, 142 F.3d 907 (6th Cir. 1998) *cert. pending* (No. 98-454). Although the issues raised in *City of Cincinnati* do not involve the special compelling state interest of judicial impartiality, if this Court overturns the Sixth Circuit in *City of Cincinnati*, it necessarily, for that reason alone, must overturn the Sixth Circuit in this action.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request the Court to grant the writ.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General

MICHAEL J. RENNER
Chief Counsel
Counsel of Record
ELISE PORTER
Assistant Attorney General
Office of the Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 644-8903
(614) 466-5087 (fax)

Date: October 28, 1998

(2)

Supreme Court, U.S.
FILED

No. _____ 98 737 OCT 28 1998

In The OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
October Term, 1998

JONATHAN W. MARSHALL, et al.,

Petitioners,

v.

RONALD SUSTER, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
APPENDIX VOLUME I OF II

BETTY D. MONTGOMERY
Attorney General
MICHAEL J. RENNER
Chief Counsel
Counsel of Record
FLISE W. PORTER
Assistant Attorney General
Office of the Attorney General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 644-8903
(614) 466-5087 (fax)

Counsel for Petitioners

HIPP

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Nos. 96-4048/96-4115/96-4287/96-4380, 97-3174

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD SUSTER, et al.,
Plaintiffs-Appellees,

v.

JONATHAN W. MARSHALL, et al.,
Defendants-Appellants.

Filed July 30, 1998

Appeal from the United States District Court for the Southern District of Ohio

No. 96-01736, Solomon Oliver, Jr., District Judge

Before: KEITH, SILER, and DAUGHTREY, Circuit Judges

OPINION

KEITH, Circuit Judge. Defendants-Appellants appeal the district court's grant of preliminary injunction, enjoining the enforcement of Canon VII(C)(6) of the Ohio Code of Judicial Conduct. Plaintiffs-Appellees, Suster and Clear, cross-appeal the district court's denial of preliminary injunction to enjoin enforcement of Canon VII(C)(8) of the Ohio Judicial Code of Conduct. For the reasons set forth below, we AFFIRM the decision of the district court.

I. Factual Background

Plaintiffs are judges on the Cuyahoga County Common Pleas Court. Judge Ronald Suster ("Suster") was appointed to the judiciary in October 1995. His judicial term expired on December 31, 1996. From 1981 to 1995, prior to his appointment to the judiciary, Suster served as an elected member of the Ohio House of Representatives from Cuyahoga County. During Suster's tenure as a State Representative, Suster received campaign contributions which were deposited with his campaign committee, "Friends of Ron Suster."

Effective July 1, 1995, the Ohio Supreme Court, pursuant to its powers to regulate the judiciary and bar of the State of Ohio, enacted Judicial Canons VII(C)(6)(d) and VII(C)(8). Judicial Canon VII(C)(6)(d), in its original form, prohibited any candidate in a judicial election from spending more than $75,000.00 in a race for judgeship for the Ohio Common Pleas Court. The provision also prohibited a judicial candidate from spending more than $18,750.00 in the primary election.

In 1996, Suster, while campaigning for re-election, brought suit challenging the constitutionality of the primary campaign spending limit of $18,750.00 ("Suster I"). Prior to a ruling in Suster I, however, the Ohio Supreme Court amended and removed the portion of the Canon which imposed an expenditure limit in primary elections. On February 20, 1996, without a hearing, a Final Consent Decree was entered enjoining Defendants from enforcing the primary election campaign spending limit. Suster, thereafter, spent $72,710.01 to communicate his qualifications and experience to the voters.

Having nearly surpassed the $75,000 spending cap in a judicial election, Suster, along with Judge Patricia Cleary ("Cleary"), filed the instant action seeking declaratory and

injunctive relief from the amended Judicial Canon VII(C)(6).[1] They also sought to enjoin and declare unconstitutional Judicial Canon VII(C)(8).[2] Canon VII(C)(8) prohibits anyone from using money raised in a previous non-judicial campaign in a subsequent judicial campaign. Suster challenged this provision because he desired to use the remainder of his state representative campaign contributions toward his efforts for a judgeship.

---

[1]Canon VII(C)(6) states:

. . . The total amount of expenditures made in the fund raising period allowed by division (C)(4) of this Canon by the campaign committee of a judicial candidate shall not exceed the following:

(a) Five hundred thousand dollars in the case of a judicial candidate for chief justice of the Supreme Court;

(b) Three hundred fifty thousand dollars in the case of a judicial candidate for justice of the Supreme Court;

(c) One hundred thousand dollars in the case of a judicial candidate for the court of appeals;

(d) Seventy-five thousand dollars in the case of a judicial candidate for the court of common pleas;

(e) Fifty thousand dollars in the case of a judicial candidate for municipal or county court.

[2]Canon VII(C)(8) states:

"[a] judicial candidate shall not expend funds in a judicial campaign that have been contributed to him or her to promote his or her candidacy for a nonjudicial office."

Conversely, Cleary sought to challenge both Canons arguing that when her term expires in December 2000, she would like to spend more than $75,000 on her re-election campaign. Cleary and Suster both maintain that as registered voters they are entitled to hear as much campaign speech as a candidate wishes to utter.

After a hearing, the district court determined that there was a strong likelihood that Plaintiffs would succeed in establishing on the merits that Canon VII(C)(6) was unconstitutional. The district court determined, however, that Plaintiffs were unlikely to succeed in establishing on the merits that Canon (VII)(C)(8) was unconstitutional. Consequently, the district enjoined Defendants from enforcing Canon VII(C)(6) and refused to enjoin Defendants from enforcing Canon VII(C)(8).

Defendants filed a motion for stay pending appeal stating that the language of the injunction was over-broad. The district court, rather than granting the motion for stay, modified its original order and enjoined enforcement of Canon VII(C)(6) against Plaintiffs only. Defendants filed a timely notice of appeal, and Plaintiffs filed a timely notice of cross-appeal.

On October 10, 1996, Jack Durkin, Beth Smith, and Robert Lisotto filed a motion to intervene as plaintiffs and requested a preliminary injunction. On October 15, 1996, Stuart Saferin, Christopher Boyko, and Gail Rose Kane also filed a motion to intervene as plaintiffs and requested a preliminary injunction. As there was no opposition to the proposed intervention, the district court granted both motions. The district court also granted the Intervenors' motion for preliminary injunction, to which Defendants filed a timely notice of appeal.

Both set of Intervenors were sitting as judges on the Court of Common Pleas for Cuyahoga County or they were

judicial candidates for such position. The Intervenors stated in their petition for injunctive relief that they had the "wherewithal to spend, and intended to spend, sums in excess of the campaign spending cap." (Response Brief for Intervenors at 2.) They argued that if they exceeded the cap, they faced investigations from the Judiciary of Ohio, and possible disciplinary sanctions, fines, cease and desist orders, and an assessment of costs.

Nancy Russo, a judicial opponent of Intervenor Saferin, sought to intervene as a new party defendant and to have the case dismissed. The court denied Russo's motion to dismiss. Thereafter, Russo filed a motion to be dismissed as a defendant. The court granted that motion.

On October 22, 1996, the district court issued an order granting preliminary injunction to all plaintiffs and, upon consent by all the parties, extended the preliminary injunction order to include not only Plaintiffs and Intervernor-Plaintiffs, but also their respective opponents.

On November 1, 1996, Timothy Maloney sought to intervene as an additional plaintiff. He also moved for preliminary injunction. On November 25, 1996, the district court granted Maloney's motion to intervene and for preliminary injunction. Defendants again filed a timely notice of appeal.

On January 27, 1997, the district court entered a marginal order denying without prejudice Defendants' motion to dismiss Count three of Suster's and Cleary's complaint pending this appeal. Defendants appeal that decision as well.

Amicus Curiae briefs were filed by the American Civil Liberties Union of Ohio; the Ohio State Bar Association; and Attorney Generals of twenty-two states, Secretaries of eight states, the the National Voting Rights Institute and the Brennan Center for Justice.

II. Jurisdiction

This Court has jurisdiction over the issuance of a preliminary injunction, pursuant to 28 U.S.C. § 1292(a)(1). Jurisdiction to consider Defendants' appeal of the district court's refusal to dismiss Plaintiffs' substantive due process claim under the Eleventh Amendment, is also appropriate pursuant to the collateral order doctrine and 28 U.S.C. § 1291.

III. Mootness

Although the 1996 election is over, all of the parties assert that this action is not moot as the controversy is "capable of repetition, yet evading review." *See Norman v. Cook County Officers Electoral Bd.*, 502 U.S. 279, 288, 112 S. Ct. 698, 705, 116 L. Ed. 2d 711 (1992).

In *Weinstein v. Bradford*, 423 U.S. 147, 148, 96 S. Ct. 347, 348, 46 L. Ed. 2d 350 (1975), the Supreme Court held that:

> In absence of a class action, the 'capable of repetition, yet evading review' doctrine was limited to the situation where two elements combined: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.

The instant action was not filed until August, 1996, three months prior to the general election. Although the parties may have won their respective- seats in that election, all have indicated that they intend to seek re-election. Given the short duration between the filing of this action and the general

election, there is a "reasonable expectation" that these same litigants, in addition to any other potential candidates in a subsequent election, "would be subjected to the same [constitutional] action again." *Id; see also Renne v. Geary*, 501 U.S. 312, 319-20, 111 S. Ct. 2331, 2338, 115 L. Ed. 2d 288 (1991).

The question of whether the district court abused its discretion in granting the preliminary injunction is still ripe. If this Court were to determine that the district court erred in issuing the preliminary injunction, then the legal interests and positions of Plaintiffs and Intervenors would be compromised as they have received no assurances that grievances will not be pursued and penalties not imposed under the old Canon. *See Edgar v. Mite Corp.*, 457 U.S. 624, 647-54, 102 S. Ct. 2629, 2643-47, 73 L. Ed.2d 269 (1982) (Stevens, J., concurring); *McPherson v. Michigan High School Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997). ("The test for mootness 'is whether the relief sought would, if granted, make a difference to the legal interest of the parties.'") (citation omitted). Hence, this Court's review of the district court's grant and denial of preliminary injunction cannot be said to be moot.

As to the substantive challenge to the constitutional merits of Canon VII(C)(6) and Canon VII(C)(8), this Court may no longer consider the former version of Canon VII(C)(6) as it has recently been amended. *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414, 92 S. Ct. 574, 575, 30 L. Ed. 2d 567 (1972). However, because such expenditure limitations for judicial candidates continue to remain in the revised Canon, albeit they are now population-based, there is still a case and controversy between the parties. The Supreme Court has held that where a new Canon "is sufficiently similar to the [amended Canon] it is permissible to say that the challenged conduct continues," the controversy is not mooted by the change, and a federal court continues to have jurisdiction. *Northeastern Fla.*

Chapter v. City of Jacksonville, 508 U.S. 656, 662 n. 3, 113 S. Ct. 2297, 2301 n. 3, 124 L. Ed. 2d 586 (1993). Hence, there is jurisdiction over the revised Canon VII(C)(6), as well as Canon VII(C)(8).

With this is mind, Defendants maintain that this Court must "review the judgment of the district court in light of [the] law as it now stands, not as it stood when the judgment was reviewed below." (Reply Brief for Defendants at 1 n.1) (citing *Diffenderfer v. Central Baptist Church,* 404 U.S. 412, 414, 92 S. Ct. 574, 575, 30 L. Ed. 2d 567 (1972).

However, the fact that the Canon has been revised is of no import to this Court's decision to refrain from reviewing the amended Canon because, where a change in law does not extinguish the controversy, the preferred procedure is for the court of appeals to remand the case to the district court for reconsideration of the case under the amended law. *See Concerned Citizens of Vicksburg v. Sills,* 567 F.2d 646, 650 (5th Cir.1978); *Korn v. Franchard Corp.,* 456 F.2d 1206, 1208 (2d Cir.1972).

Hence, as the district court never had the opportunity to fully address the merits of Plaintiffs' challenge prior to the amendment during this appeal, nor has it had the opportunity to fully consider the constitutionality of the amended Canon, this Court will refrain from considering the merits of amended Canon VII(C)(6); limit its review to the consideration of the appropriateness of preliminary injunction under the old Canon VII(C)(6) and under Canon VII(C)(8); and remand amended Canon VII(C)(6) to the district court for a full review.

IV. Standard of Review

We review a district court's issuance of a preliminary injunction for an abuse of discretion. *In re Eagle-Picher Indus.,*

Inc., 963 F.2d 855, 858 (6th Cir. 1992). Findings of fact are reviewed for clear error and legal conclusions de novo. *Id.* "A legal or factual error may be sufficient to determine that the district court abused its discretion. However, absent such an error, the district court's weighing and balancing of the equities is overruled 'only in the rarest of cases.'" *Id.* (quoting *NAACP v. City of Mansfield*, 866 F.2d 162, 166 (6th Cir. 1989)).

Four factors are considered in determining whether to grant a preliminary injunction: 1) whether the movant has demonstrated a strong likelihood of success on the merits; 2) whether the movant would suffer irreparable harm; 3) whether an injunction would cause substantial harm to others; and 4) whether the public interest would be served by the issuance of such injunction. *Frisch's Restaurant, Inc. v. Shoney's, Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985).

"It is important to recognize that the four considerations applicable to preliminary injunction are factors to be balanced and not prerequisites that must be satisfied. These factors simply guide the discretion of the court; they are not meant to be rigid and unbending requirements." *In re Eagle-Picher*, 963 F.2d at 859.

V. Preliminary Injunction -- Canon VII(C)(6)

A. *Likelihood of Success on the Merits*

Defendants maintain that the district court erred in determining that there was a likelihood of success on the merits. Defendants propose that the district court applied the wrong legal standard for judicial campaigns. Because a judicial officer has the responsibility to fairly and impartially apply the law, Defendants argue that strict scrutiny should not apply. Rather, Defendants suggest that the district court should have balanced the "interests of the individual to comment on matters of public

interest and the [alleged] government interest [involved]." (Brief for Defendants at 22.) Consequently, Defendants maintain that the district court erred in its analysis and in its ultimate reliance on *Buckley v. Valeo*, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976). This Court rejects Defendants' proposition.[3]

The First Amendment of the United States Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I. (Emphasis added.)

Infringements upon any individual's exercise of First Amendment rights, especially where they have their most urgent application -- in campaigns for electoral offices -- requires strict scrutiny review. *See Fed. Election Comm'n v. Mass. Citizens For Life, Inc.*, 479 U.S. 238, 251-52, 107 S. Ct. 616, 624, 93 L. Ed. 2d 539 (1986) (Restrictions so burdening political speech can survive a constitutional attack only if justified by a compelling state interest.); *Kruse v. Cincinnati*, 142 F.3d 907, 912 (6th Cir. 1998) (quoting *Buckley*, "expenditure limitations

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[3]Defendants argue that because Buckley involves: 1) federal campaign laws; 2) of a non-judicial nature; 3) which impose criminal penalties for violations, it was not intended to apply to state judicial elections. These arguments will be dismissed for the same reasons that Court dismisses Defendants' attempt to distinguish judicial elections from all other elections.

restricting political expression at the core of the electoral process and the First Amendment are subject to exacting scrutiny.").

In *Buckley*, the Supreme Court stated:

> Expenditure limitations operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'

Id. 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 77 S. Ct. 1304, 1308, 1 L. Ed. 2d 1498 (1957)). "It is with these principles in mind that we consider the primary contentions of the parties with respect to the [Canon's] limitations upon the . . . spending of money in [any] campaign." *Id.* 424 U.S. at 15.

Review of the constitutionality of spending limits in *Buckley* was not based upon the line of reasoning that such limitations should apply only to federal political campaigns. Rather, the constitutionality of such limitations was based upon the reasoning that any expenditure limitation -- irrespective of the kind of election involved (state, federal, judicial, non-judicial, civil penalties, criminal penalties, etc.), "in a republic where the people are sovereign, [and] the ability of the citizenry to make informed choices among candidates for office is essential," must be narrowly tailored and serve a compelling

government interest in order to infringe upon a "most fundamental First Amendment activity." *Id.*

This intention is evident from the numerous court decisions that have been rendered since the issuance of *Buckley*. See *Austin v. Michigan Chamber of Commerce,* 494 U.S. 652, 657, 110 S. Ct. 1391, 1396, 108 L. Ed. 2d 652 (1990) ("To determine whether Michigan's restriction on corporate political expenditures may constitutionally be applied to the Chamber, we must ascertain whether it burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest."); *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 786, 98 S. Ct. 1407, 1420-21, 55 L. Ed. 2d 707 (1978) (Constitutionality of a restriction by Massachusetts on corporate expenditures depends on surviving exacting scrutiny.); *Shrink Missouri Government PAC, v. Maupin,* 71 F.3d 1422, 1425 (8th Cir. 1995) (Missouri's Senate Bill imposing direct and substantial restraints on the quantity of speech in state electoral campaign at the core of First Amendment freedoms must be strictly scrutinized.); *Kruse v. Cincinnati,* 142 F.3d at 912 (There is no support for the contention that states have more latitude than the federal government in regulating the First Amendment expression of its citizens; hence, Cincinnati's City Ordinance placing a cap on a City Council candidate's campaign expenditures requires strict scrutiny review. Court rejects less rigorous standard proffered by defendants.).

Although Defendants cite several cases to support their argument that there is a distinct difference between judicial officers and political officers, this Court finds that an election candidate does not forego his or her First Amendment rights simply because he or she decides to seek a judicial office, rather than a non-judicial one.

Further, to the extent Defendants have attempted to raise the argument that *Buckley* was not intended to apply to state elected judicial officers because federal judges are appointed, not elected, such an attempt misses the mark.

While it is true that the issue in Buckley involved federal campaign legislation, that fact simply illustrates that Congress, in enacting the legislation, did not intend for the legislation to apply to state elections. There is not the slightest indicia, however, that the Supreme Court, in its ruling, sought only to protect the First Amendment rights of just federal election candidates. To the contrary, the Supreme Court has already determined that states have no greater power to restrain an individual's freedoms protected by the First Amendment than does the Congress of the United States. *Wallace v. Jaffree*, 472 U.S. 38, 48-49, 105 S. Ct. 2479, 2485, 86 L. Ed. 2d 29 (1985).

Given the fundamental nature of the right involved, this Court is of the opinion that the language of Buckley and its progeny have necessarily determined, irrespective of the kind of position sought, that any spending restriction in any electoral campaign process is an infringement on a candidate's First Amendment rights, and is subject to "exacting scrutiny." *Buckley*, 424 U.S. at 44-45. The guarantees of the First Amendment are not shaped and reshaped simply because a litigant wishes to distinguish one type of election from another. Neither the First Amendment, nor *Buckley* can be read so narrowly.

Further, this is not merely a time, place and manner restriction as Defendants assert. Defendants attempt to argue that because some courts have upheld content-based restrictions against judicial candidates that would have otherwise been held unconstitutional if applied to non-judicial candidates, it should also be able to regulate the "manner" of how or when judicial candidates may speak. *See, e.g., Stretton v. Disciplinary Bd. of*

Supreme Ct. of Pennsylvania, 944 F.2d 137, 144, 146 (3rd Cir. 1991) (upholding rules restricting candidates from personally soliciting campaign contributions and banning candidates from advertising their views on legal or political issues); *Haffey v. Taft*, 803 F. Supp. 121, 125-26 (S.D. Ohio 1992) (upholding rule that prohibits judicial candidates from identifying their party affiliation on the ballot).

However, the Supreme Court has already stated in *Buckley* that such restrictions on campaign expenditures are a restriction on a candidate's "quantity of expression" and not a time, place and manner restriction. *Buckley*, 424 U.S. at 17.

> The critical difference between [spending limits] and those time, place and manner cases is that the present [Canon's] contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates and political parties in addition to any reasonable time, place and manner regulation otherwise imposed.
>
> A restriction on the amount of money a person or group can spend on [judicial] communication during a campaign necessarily reduces the quantity of expression . . . and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs.

Buckley, 424 U.S. at 18-19 (footnotes omitted).

This Circuit has also stated,

> . . . it cannot be seriously argued that the prohibition at issue does not restrict the quantity of political speech. Therefore, for the same reason cited by *Buckley*, [campaign expenditure limits] cannot be characterized as a mere time, place and manner restriction.

Gable v. Patton, 142 F.3d 940, 953 (6th Cir. 1998).

Further, given the fact that other courts have already allowed such content-based restrictions and limitations to be placed on judicial campaigns in order to limit bias and the appearance of corruption, Defendants are more hard-pressed to justify the additional infringement on the *quantity* of Plaintiffs' exercise of their fundamental First Amendment rights. Hence, Defendants' alleged time, place and manner argument is insufficient and must fail.

In 1992, the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court created a subcommittee to conduct a comprehensive review of the Ohio Code of Judicial Conduct. ("First Committee.") In 1993, an Ad Hoc Committee was created by the Ohio State Bar Association to review the Ohio Supreme Court's Campaign Finances. ("Ad Hoc Committee.")

On September 13, 1993, the First Committee and the Ad Hoc Committee submitted their reports to the Ohio Supreme Court. Both the First Committee and the Ad Hoc Committee recommended that "population based" campaign spending limits be placed on candidates running for judicial office. Another recommendation from the Ad Hoc Committee also included disqualification for campaign contribution violations.

Several of the First Committee members opposed the placement of spending limitations due to "the potential for proscription of constitutionally protected speech . . . and the lack of empirical data that justice is, in fact, for sale by the existence of election results which do not favor the biggest spender." (Joint App. at 260). Conversely, the Ad Hoc Committee "wholeheartedly supported the [proposed] expenditure limitations." (Joint App. at 275).

In September 1993, Chief Justice Moyer of the Ohio Supreme Court submitted the reports of the First Committee and the Ad Hoc Committee to a special committee ("Special Committee"), to conduct a "top-to-bottom review of Ohio's judicial election system." (Joint App. at 247).

The Special Committee, thereafter, authorized a public opinion poll to be conducted by the University of Cincinnati's Institute for Policy Research. In addition to the poll, the Special Committee questioned judges, attorneys, and campaign consultants, and conducted public hearings throughout the state of Ohio. The results of the poll were as follows:

- 58% of the voters thought that candidates were influenced by contributions made to a candidate's election, some of the time; 23% thought candidates were influenced most [*24] of the time.

- Of the voters who did not always vote in a judicial election, 58% thought that having more information about candidates would be helpful in encouraging them to vote; 41% thought that more information on endorsements received by candidates would be helpful.

- Over 60% of the voters polled indicated that they wanted more information on a candidate's reputation as an attorney and potential judge; information on a candidate's experience; and information on a candidate's views on legal issues.

- 58% of the voters indicated that the conduct of most judicial candidates makes no difference in the voter's respect for judges in Ohio; 25% indicated that the conduct of judicial candidates diminishes the voter's respect.

- 66% of the voters indicated that commercials and ads about judicial candidates make no difference in the voter's respect for judges in Ohio; 26% indicated that commercials and ads diminish the voter's respect.

- Lastly, when asked "how useful would the following proposals be in helping to limit the influence of campaign contributions on judicial decisions," 56% of the voters polled indicated that limits on total campaign spending would be helpful; 45% indicated that limits on campaign contributions would be helpful; 45% indicated that increased contribution reporting requirements would be helpful; and 9% indicated that paying for judicial election campaigns with tax money would be helpful.

In January 1995, the Special Committee's report (the "Report") was submitted to the Ohio Supreme Court. The Report indicated that "nine out of ten Ohioans believe judicial decisions are influenced by contributions to political campaigns." Based on this information, as well as other factors, the Report

recommended: (1) time limitations for raising and spending campaign funds; (2) prohibitions from "carrying-over" funds from one election year to another; (3) prohibitions from using campaign funds raised as a candidate in another public office; and (4) disqualification for certain campaign contribution violations. (Joint App. at 35). The Report did not make any recommendations to place expenditure limitations on judges and judicial candidates. The Report stated,

> "although a cap on spending might seem to be the simplest approach to reducing the large amount of money spent on campaigns, mandatory expenditure limits in non-judicial races have been determined to be unconstitutional. In addition, spending limits can provide an undue advantage to incumbents and candidates with well-known names."

(Report of the Citizens' Committee on Judicial Elections at 7, Joint App. at 308).

After the Report was submitted to the Ohio Supreme Court, and after various submissions of letters, proposals and schools of thought by judges, bar associations, professors, interest groups, and citizens, etc., in March 1995, the Ohio Supreme Court requested the Special Committee to reconvene on the subject of spending limitations in judicial campaigns. After reconvening and conducting a full review of the proposals submitted, the Special Committee again reiterated that "the members did not embrace spending limits" because the "proponents of spending limits could not articulate a compelling state interest to the Committee's satisfaction," in light of *Buckey v. Valeo*. The Special Committee also stated that "by their very nature, spending limits in judicial campaigns make it difficult for challengers to mount an effective campaign against an entrenched incumbent, an opponent with a popular or well

known surname or the so-called 'bad apple' judge." (Joint App. at 538-39).

Notwithstanding this reiteration by the Special Committee, the Ohio Supreme Court revised Canon VII and enacted such spending limitations, effective July 1995.

The Supreme Court has determined that the only interest compelling enough to infringe upon the First Amendment rights of a candidate seeking an electoral office is the prevention of corruption or the appearance of corruption. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97, 84 L. Ed. 2d 455, 105 S. Ct. 1459 (1985). Although Defendants cite several other interests, the prevention of corruption is the only interest the Supreme Court has and, hence, this Court will give credence.

In reviewing Defendants' compelling state interest of alleviating corruption and the appearance of corruption, the district court determined, in accordance with *Buckley*, that a spending cap on the amount that a candidate may spend has little nexus to the state interest of preventing corruption. The district court reasoned that, unlike a campaign contributor, a candidate's own money is not traded for possible political favors. (Joint App. at 107).

Defendants rely heavily on the poll which indicated that 56% of the voters believed that a proposal limiting the total amount a candidate may spend would be helpful to limit the influence of campaign contributions on judicial decisions. Yet, Defendants have proffered no evidence to show a correlation between such campaign expenditures and any corruption. In fact, all of the evidence presented by Defendants appears to suggest that the problem of corruption has resulted from problems with campaign contributions, not expenditures.

Moreover, inasmuch as poll results indicate that voters want more information, not less, unlimited campaign expenditures may, in fact, promote and establish an electorate that is informed and well-aware. This may also help minimize some forms of corruption.

Although Defendants make reference that such expenditure limits will help ensure the independence of the judiciary and ensure that a candidate is "beholden to no one," it is not clear to the Court how Defendants can link a spending limitation on a candidate's own money to such an assurance. In the view of this Court, the very fact that the candidate is allowed to spend his or her own money without any restriction is, in fact, the assurance that the candidate is "beholden to no one."

Accordingly, "we are hard-pressed to discern how the interests of good government could possibly be served by campaign expenditure laws that necessarily have the effect of limiting the quantity of political speech in which candidates for public office are allowed to engage." *Shrink Missouri Government Political Action Comm. v. Maupin*, 71 F.3d 1422, 1426 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033, 116 S. Ct. 2579, 135 L. Ed. 2d 1094 (1996).

Nevertheless, even with the compelling state interest of preventing corruption, Defendants have failed to demonstrate that such expenditure limitations are narrowly tailored. Assuming that unlimited campaign expenditures are tied to corruption and some form of *quid pro quo*, a least restrictive means of redressing that problem, as stated by the district court, would be restricting campaign contributions, and/or mandating disqualification if violated. Simply put, there are other avenues available to Defendants to prevent corruption or the appearance of corruption, but, a limitation on campaign expenditures is not one of them.

The district court did not abuse its discretion in finding that Plaintiffs have demonstrated a likelihood of success on the merits.

B. *Irreparable Harm*

With respect to Defendants' claim that the district court abused its discretion by determining that Plaintiffs would suffer irreparable harm, Defendants' position is again unavailing.

Defendants argue that there would be no irreparable harm because: (1) Cleary was not a candidate in the 1996 election, she merely wanted to hear speech from the candidates; (2) Suster's opponent dropped out of the race and Suster ultimately ran unopposed; and (3) Intevernor Maloney's injunction was not granted until after the election, so he could not have suffered any harm.

As the district court determined, "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." (Joint App. at 114) (quoting *Elrod v. Burns*, 427 U.S. 347, 372, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976); *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("even minimal infringement upon First Amendment constitutes irreparable injury sufficient to justify injunctive relief.")).

First, Cleary as a voter has a First Amendment right to receive information. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 756, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1979). Second, Suster's opponent's status prior to the actual election is irrelevant to the harm Suster would have suffered from being prohibited from communicating with potential voters. His right to speak under the First Amendment is not conditioned upon there being an opposing candidate. Finally, any penalties that would be imposed upon

Maloney for violating Canon VII(C)(6), and for exercising his First Amendment rights, would indeed be irreparable. Thus, the district did not abuse its discretion.

C. *Harm to Others*

Defendants argue that the opponents of the candidates were harmed because they were "suddenly faced with an election in which 'the sky was the limit' for campaign spending." Defendants suggest that the opponents may not have entered the campaign if they knew their opponents would have been able to spend beyond the spending cap. This argument lacks merit.

All judicial candidates affected by the district court's injunction were affected equally. No opponent other than Russo (who ultimately withdrew her claim), sought to intervene and support the spending limitation. Moreover, the fact that a candidate could go over the spending limit would not cause an opponent to suffer any harm. The opponent, if he or she saw fit, could also exceed the spending cap enjoined by the district court. Thus, this argument must fail.

D. *Public Interest*

Likewise, the district court did not abuse its discretion in finding that "there is no public interest in enforcing a law that 'curtails debate and discussion' regarding issues of political import." *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal.*, 454 U.S. 290, 299, 70 L. Ed. 2d 492, 102 S. Ct. 434 (1981).

Preliminary Injunction enjoining the enforcement of Canon VII(C)(6) was appropriate. The district Court did not abuse its discretion.

VI. Preliminary Injunction -- Canon VII(C)(8)

A. *Likelihood of Success on the Merits*

On cross-appeal, Plaintiffs argue that the district court erred in denying preliminary injunction enjoining the enforcement of Canon VII(C)(8), which prohibits a candidate from using funds received in a non-judicial campaign in a subsequent judicial campaign.

The district court determined that because Canon VII(C)(8), like Canon VII(C)(6), infringes upon Plaintiffs' First Amendment rights, then such infringement must be narrowly tailored to serve an overriding state interest.

It cannot be disputed that the compelling need to avoid corruption and the appearance of corruption could only be served by enforcement of Canon VII(C)(8). Although other non-judicial candidates are permitted to use funds raised in one campaign in a subsequent campaign, *see Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1315 (9th Cir. 1992), *cert. denied*, 505 U.S. 1230, 120 L. Ed. 2d 922, 112 S. Ct. 3056, 112 S. Ct. 3057 (1992), because of the need to avoid corruption or the appearance of corruption in the judiciary, Canon VII(C)(8), along with several other Canons (which Plaintiffs' have not challenged as unconstitutional) were enacted. Together the Canons prohibit candidates from personally soliciting campaign funds; limit the amount of funds an individual may contribute to a candidate's campaign; and prohibit a candidate from promising how she will rule on certain matters.

Yet, in order to give full force and effect to the other Canons, judicial candidates must also comply with Canon VII(C)(8). By complying with Canon VII(C)(8), judicial candidates are prevented from using funds which may

potentially be "ideas-bought" funds, or funds which came attached to a candidate's agreement to advance or take on some political issue or cause. Thus, because it is very possible that the funds Suster (or any other candidate) received during his non-judicial campaign may have resulted from the advancement of a position or the endorsement of some political ideology, the state's interest to ward against such corruption or such perceived corruption is indeed compelling.

Further, Canon VII(C)(8) is narrowly tailored. In all of the cases that have allowed such transfers of funds from one campaign to another, none have involved judicial elections. *See Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1315 (9th Cir. 1992), *cert. denied*, 505 U.S. 1230, 120 L. Ed. 2d 922, 112 S. Ct. 3056, 112 S. Ct. 3057 (1992); *Shrink Missouri Gov't Political Action Comm v. Maupin*, 71 F.3d 1422, 1427-28 (8th Cir. 1995), *cert. denied*, 518 U.S. 1033, 116 S. Ct. 2579, 135 L. Ed. 2d 1094 (1996). Here, the restriction applies only to the use of funds from a non-judicial campaign in a subsequent judicial campaign. Suster is not prohibited from using the funds in another non-judicial campaign, nor is he prohibited from using his judicial campaign funds in a subsequent judicial campaign or a subsequent legislative campaign.

Consequently, the district court did not abuse its discretion in determining that Plaintiffs were not likely to succeed on the merits of this claim.

B. *Remaining Factors*

Although the loss of First Amendment freedoms results in irreparable injury, as the district court duly noted, the injury caused to Suster "is no more than is necessary to further compelling state interests." (Joint App. at 122).

Further, there is substantial harm that would come to others if the injunction were granted. Irrespective of Suster's opponent's status in the race, other judicial candidates would be harmed and at a severe disadvantage if Suster were allowed to use money obtained by means not allowed in judicial campaigns.

Finally, the public interest certainly favors the enforcement of Canon VII(C)(8). As the district court stated, "the state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect." (Joint App. at 122-23) (citing *Morial v. Judiciary Comm'n of State of Louisiana*, 565 F.2d 295, 302 (5th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 1013, 56 L. Ed. 2d 395, 98 S. Ct. 1887 (1978)).

The district court did not abuse its discretion in refusing to enjoin the enforcement of Canon VII(C)(8).

VII. State Substantive Due Process Claim

Defendants contend that the district court erred in denying their motion to dismiss Count three, a pendent state law substantive due process claim that the Ohio Supreme Court acted outside its authority under the Ohio Constitution.

Defendants maintain that they were entitled to Eleventh Amendment immunity against this claim. Conversely, Plaintiffs argue that because the Ohio Constitution provides that the regulation of elections are governed by the legislative branch of government, then the Ohio Supreme Court acted outside its authority, hence ultra vires .

As the district court denied Defendants' motion to dismiss without prejudice pending this appeal, this Court, therefore, remands Defendants' motion to dismiss Count three back to the district court for full consideration of the merits.

VIII. Conclusion

Accordingly, the judgment of Judge Solomon Oliver, Jr. is AFFIRMED. This action is REMANDED for consideration of Canon VII(C)(6) as amended, with leave for Plaintiffs to amend their complaint if they so desire; and REMANDED for the district court's consideration of Defendants' motion to dismiss Count three.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

IN THE MATTER OF: Case : 1:96-cv-01736

Judge Solomon Oliver Jr. - pre

Suster - plaintiff

v.

Marshall - defendant

NOTICE OF MARGINAL ENTRY ORDER

Notice To:

Olivia O. Singletary, Esq.
Office Of The Attorney General
Chief Counsel's Staff
30 East Broad Street
17th Floor
Columbus, OH 43215

** The following ruling was made on 1/27/97 and entered on the docket:

MARGINAL ENTRY ORDER: finding the motion by pltfs for extension of time until 9/11/96 to file resp to defts' mot to dism count III of the cmp [14-1] den as moot (issued on 1/27/97) Judge Solomon Oliver Jr.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RONALD SUSTER, et al.,	:	Case No. 1:96 CV 1736
	:	
Plaintiffs	:	JUDGE SOLOMON
	:	OLIVER, JR.
v.	:	
	:	
JONATHAN W.	:	
MARSHALL, et al.	:	
	:	
Defendants	:	ORDER (November 25, 1996)

Previously, Nancy Russo moved to intervene as a defendant in this case, and the court granted that motion. Russo has now moved to dismiss herself as a defendant (docket no. 50), and no party opposes this motion. Because the court finds the motion well-taken, Russo's motion to dismiss herself as a party in this case is granted.

In addition, Timothy P. Maloney has filed a motion to intervene as a plaintiff in this case (docket no. 51). Maloney has also filed a motion for a preliminary injunction (docket no. 52), asking the court to grant to him the same relief the court previously granted to the other plaintiffs and plaintiffs-intervenor in this case. Defendants have opposed both these motions. The court, however, finds both motions well-taken, for the same reasons it found the analogous motions by the other intervenors (Smith, Durkin, Lisotto, Saferin, Boyko, and Kane) well-taken. See this court's order dated October 22, 1996.

Accordingly, Maloney's motion to intervene is granted, pursuant to Fed. R. Civ. P. 24(b), it being clear that the intervenor Maloney and the other parties plaintiff raise common questions of both law and fact. Further, Maloney's motion for preliminary injunctive relief is granted as follows: defendants are hereby enjoined from enforcing Canon 7(C)(6) of the Ohio Code of Judicial Conduct against intervenor Maloney.

Finally, the court makes the following observations regarding any proposed future intervenors. At this juncture: (1) the November 5, 1996 election is over; (2) the legal and factual issues in this case are distinctly framed; (3) the court has set a discovery schedule; (3) the passage of time makes it increasingly likely that questions of law and fact raised by any future proposed intervenors will *not* be common to those questions presently raised by the existing parties; and (4) with this court's every grant of a new motion for preliminary injunctive relief, the parties' appeal rights (and the Sixth Circuit's review) become procedurally and factually more complex. For these reasons, the court adds that it is not disposed toward granting any future motions for intervention in this case.

IT IS SO ORDERED.

/s/

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RONALD SUSTER, et al.,	:	Case No. 1:96 CV 1736
	:	
Plaintiffs	:	JUDGE SOLOMON
	:	OLIVER, JR.
v.	:	
	:	
JONATHAN W.	:	
MARSHALL, et al.	:	
	:	
Defendants	:	ORDER (October 22, 1996)

As set out more fully below, the court rules on the motions currently pending in this case as follows:

- Motion by Smith, Durkin, and Lisotto to intervene (docket no. 26) is granted.

- Motion by Saferin, Boyko, and Rose to intervene (docket no. 31) is granted.

- Motion by Russo to intervene (docket no. __) is granted.

- Motion by Durkin, Smith, and Lisotto for preliminary injunction (docket no. 27) is granted.

- Motion by Saferin, Boyko, and Rose for preliminary injunction (docket no. 32) is granted.

- Motion by Russo to dismiss Saferin's complaint (docket no. ___) is denied.

I.

On October 10, 1996, this court held a telephone status conference in this case. Present were the following counsel, representing the following parties: (1) Tim Grendell and Mark Ferguson, representing plaintiffs Suster and Cleary; (2) Mike Renner and Steve Taylor, representing all defendants; (3) Marc Dann, representing proposed intervenors-plaintiff Beth Smith, Jack Durkin, and Robert Lisotto; and (4) John Barath, representing proposed intervenors-plaintiff Stuart Saferin, Christopher Boyko, and Gail Rose Kane. The topic of discussion at this conference was the imminent filing of motions to intervene by persons who are candidates for judicial positions in the Cuyahoga County Court of Common Pleas (Saferin, Boyko, and Kane) and the Mahoning County Court of Common Pleas (Smith, Durkin, and Lisotto).

Proposed intervenors-plaintiff have now filed formal motions to intervene and motions for preliminary injunctive relief. Counsel for defendants indicated during the status conference that there is no opposition to the motions for intervention. Accordingly, pursuant to Fed. R. Civ. P. 24(b), the two motions to intervene which were discussed at the status conference are granted as unopposed, it being clear that the intervenors and original plaintiffs raise common questions of both law and fact.

Regarding intervenors-plaintiff Saferin, Boyko, and Kane, the defendants agreed during the status conference that there was no relevant factual or legal distinction between these judicial candidates and original plaintiffs Suster and Cleary. Defendants did argue, however, that the *opponents* of these three intervenors in the November 15, 1996 election should be heard on whether injunctive relief is appropriate, as any relief allowing the intervenors to exceed the $75,000 expenditure cap would affect the intervenors' election opponents. Indeed,

defendants argued that these opponents might be necessary parties under Fed. R. Civ. P. 19(a)(2)(i). Defendants later contacted directly at least some of the intervenors' opponents to alert them to the motions for intervention. Saferin's opponent, Nancy Russo, responded by immediately filing her own motion to intervene, and also a motion to dismiss Saferin's complaint, partly on the basis that she is a necessary party.

It is again clear that Russo and the other plaintiffs raise common questions of both law and fact. Accordingly, Russo's motion to intervene is granted. The court now turns to the question of the propriety of preliminary injunctive relief in favor of intervenors Saferin, Boyko, Kane, Durkin, Smith, and Lisotto.

The court first addresses the motion for preliminary injunctive relief of Saferin, Boyko, and Kane ("Cuyahoga County Intervenors"). As noted, the defendants agreed there was no relevant factual or legal distinction between the Cuyahoga County Intervenors and original plaintiffs Suster and Cleary. This concession strongly suggests preliminary injunctive relief in favor of the Cuyahoga County Intervenors is appropriate. Defendants, however, in tandem with intervenor Russo, argue that preliminary injunctive relief is still not appropriate. Defendants and Russo raise four bases for denying injunctive relief.

The primary argument defendants and Russo make is that a court order allowing the Cuyahoga County Intervenors to exceed the $75,000 spending cap would injure the intervenors' election opponents ("Opponents"). Russo, for example, states she has based her campaign strategy on the existence of a $75,000 spending limit for both herself and Saferin. Russo asserts that a last-minute "rule change" lifting this spending cap damages her campaign strategy, and thus her chances for election. Russo suggests that even if the court grants injunctive

relief allowing both her *and* Saferin to exceed the spending cap, her chances for election are still damaged. Defendants extend Russo's argument to assert, essentially on behalf of all the opponents, that the court should deny injunctive relief to all intervenors.

This argument goes to the third factor regarding the propriety of granting injunctive relief: "whether the order would cause substantial harm to others." *Mason Cty. Med. Ass'n. v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977). Even accepting as valid Russo's argument that injunctive relief in favor of Saferin would cause her substantial harm, the remaining three factors weigh overwhelmingly in support of granting the requested injunctive relief. *See generally* Order at 5-15 (Sept. 25, 1996) (noting plaintiffs' "very high likelihood of success on the merits," the clear presence of irreparable harm, and the public's core interest in hearing plaintiffs' speech). Russo's alleged injury to her campaign strategy does not measurably change the balance of the four factors recited in *Knebel*, and thus does not significantly distinguish Saferin or the other Cuyahoga County Intervenors from the original plaintiffs.

In her motion to dismiss Saferin's complaint, Russo also argues that Saferin should be denied injunctive relief because he failed to join her as a necessary party. The court finds this argument unpersuasive, for two reasons. First, the court granted Russo's motion to intervene; thus, she has joined the lawsuit.

Second, the court finds that neither Russo, nor any other opponent of a judicial candidate who is a party in this case, is a necessary party. To the extent any Opponent has interests that may be affected by a ruling in this case, the court largely considers those interests already when it weighs "whether the order would cause substantial harm to others." As noted, before Russo was even a party to this case, defendants asserted the

same arguments as she does now. Defendants then contacted Russo, and other election opponents of the Mahoning County Intervenors and Cuyahoga County Intervenors. Russo elected to intervene; other opponents declined to intervene or, like Roberts (opponent of intervenor Durkin) and Patricia Morris (opponent of intervenor Smith), decided to simply offer affidavits supporting Russo's position. None of the parties have shown, as a practical matter, that the absence of the opponents mentioned above may impair or impede their ability to protect their interests. More important, even if some judicial candidate not a party to this case has an "interest relating to the subject of the action" that they want to protect, Fed. R. Civ. P. 19(a)(2)(i), this court will not protect that interest by ensuring enforcement of a law this court has already declared unconstitutional.

Russo's third basis for dismissing Saferin's complaint is that his complaint is "factually insufficient." Russo contends that although Saferin avers he *intends* to incur over $75,000 in campaign expenses, he has in fact *already* spent in excess of $75,000. Even if this is true, Saferin merely has that much more of a reason to seek an injunction preventing defendants from initiating disciplinary proceedings for a violation of Canon 7(C)(6). Maintaining the status quo, in the case of Saferin, means preserving the absence of disciplinary proceedings against him. Russo's argument regarding "factual insufficiency" provides no valid basis for the court to dismiss Saferin's complaint.

Finally, Russo argues Saferin's complaint is barred by laches. Simply, the court finds Saferin and all the other intervenors were diligent in pursuing their complaint. The intervenors moved to intervene within a month of this court's initial order declaring Canon 7(C)(6) unconstitutional. Such action does not show lack of timeliness or diligence.

In sum, the court is not persuaded by any of the arguments raised by Russo and the defendants that preliminary injunctive relief in favor of Saferin, Boyko, and Kane is inappropriate. Accordingly, the motion for preliminary injunction as to Cuyahoga County Intervenors is granted, as follows: defendants are hereby enjoined from enforcing Canon 7(C)(6) of the Ohio Code of Judicial Conduct against intervenors Saferin, Boyko, and Kane. Russo's motion to dismiss Saferin's complaint is denied.[1]

The court next turns to the motion for injunctive relief filed by intervenors Smith, Durkin, and Lisotto ("Mahoning County Intervenors"). Defendants make two additional arguments as to why Mahoning County Intervenors should not be granted injunctive relief. First, defendants question whether the Mahoning County Intervenors having standing, because all three of them are still tens of thousands of dollars away from

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[1]Despite the expedited manner in which the intervenors have pursued their positions, all -- including Russo -- set forth their position with full affidavits and briefing of the law and facts. Accordingly, the court finds no hearing is necessary on the motions for preliminary injunction. "[P]reliminary injunctions are [properly] denied without a hearing, despite a request therefor by the movant, when the written evidence shows the lack of a right to relief so clearly that receiving further evidence would be manifestly pointless." *Commerce Park at DFW Freeport v. Mardian Const. Co.*, 729 F.2d 334, 341 (5th Cir. 1984) (quoting C. Wright & A. Miller, *Federal Practice and Procedure: Civil* §2949 (1973)). *See also Scott & Fetzer Co. v. McCarty*, 450 F.Supp. 274, 277 n.4 (N.D. Ohio 1977) (foregoing a preliminary injunction hearing because "a district court has discretion to forego an evidentiary hearing where undisputed facts, submitted affidavits, or other factors render such a hearing unnecessary").

reaching the $75,000 spending cap. This argument is not well-taken. The Mahoning County Intervenors have each filed affidavits averring they have money available to them that, depending on circumstances going forward, they may or may not spend on their campaign. Although the Mahoning County Intervenors do not guarantee their campaign spending will exceed the cap, they aver they have the money available to do so and thus run a significant risk of exceeding the cap. These undisputed facts are sufficient to confer standing. To hold that the Mahoning County Intervenors do not presently have standing because they "still have room" under the spending cap would only force them to seriously risk exceeding the cap, before coming back to the court to obtain the same relief they now seek. Defendants' own arguments regarding laches and timeliness demonstrate this course would not be prudent.

Defendants' second argument for denying injunctive relief to the Mahoning County Intervenors is that there is a relevant distinction between the Mahoning County Intervenors and all other plaintiffs, who are candidates for judicial office in Cuyahoga County. Specifically, defendants note that costs of political advertising are far less expensive in Mahoning County than in Cuyahoga County. Given this relative affordability of campaigning in Mahoning County, defendants argue that "the dangers of irreparable harm [to the Mahoning County Intervenors] are far lessened." Brief at 4. Defendants also make the related argument that although the $75,000 cap contained in Canon 7(C)(6) may not be narrowly tailored to fit Cuyahoga County, it is tailored enough to fit well in Mahoning County. Defendants continue to insist the Canon furthers the State's compelling interest of preventing the real or apparent corruption of its judges.

Regarding the presence *vel non* of irreparable harm to the Mahoning County Intervenors, defendants' position actually proves the court's point. Accepting defendants' argument that

a $75,000 spending cap causes "less injury" to the First Amendment rights of Mahoning County judicial candidates than Cuyahoga County candidates, defendants concede that the spending cap causes *some* harm by limiting the speech of the Mahoning County Intervenors. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Enforcement of Canon 7(C)(6) may cause the Mahoning County Intervenors a smaller loss of First Amendment freedoms than Cuyahoga County candidates, but the Mahoning County Intervenors still suffer irreparable harm.

Regarding defendants' narrow tailoring argument, as the court noted in its September 25, 1996 Order, "[t]he Supreme Court has stated clearly that while limiting campaign *contributions* may ensure the independence of elected candidates, by limiting the opportunity for 'quid pro quo' political favors, limits on campaign *expenditures* do not have any direct nexus to this type of corruption." Order at 12 (emphasis in original) (citing *Buckley v. Valeo*, 424 U.S. 1, 54-57 (1976)). The Supreme Court's reasoning applies equally to election campaigns in Mahoning County, Cuyahoga County, and every other part of Ohio and its sister states. Limiting Mahoning County judicial candidates' political speech by limiting their campaign expenditures simply does not correlate with preventing corruption or the appearance of corruption, the State's compelling interest. *Shrink Missouri Government Political Action Comm. v. Maupin*, 71 F.3d 1422, 1426 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 2579 (1996) ("we are hard-pressed to discern how the interests of good government could possibly be served by campaign expenditure laws that necessarily have the effect of limiting the quantity of political speech in which candidates for public office are allowed to engage"). Defendants' assertion that the state-wide expenditure cap of $75,000 fits Mahoning County judicial candidates "better" than Cuyahoga County judicial candidates is not

enough. Even if true, defendants have still not produced any evidence showing the $75,000 figure is narrowly tailored toward preventing real or apparent judicial corruption, in Mahoning County or anywhere else.

Given the relative cost of advertising, the First Amendment injury to the Mahoning County Intervenors may be less severe than the injury to Cuyahoga County plaintiffs. But this does not provide any meaningful factual or legal distinction: irreparable injury still exists. Similarly, the $75,000 campaign expenditure cap is no more narrowly tailored relative to Mahoning County judicial candidates than to judicial candidates anywhere else in Ohio. Thus, the Mahoning County Intervenors enjoy an equal likelihood of success on the merits as do the other plaintiffs. The four factors this court must weigh when determining whether to grant a preliminary injunction balance the same for the Mahoning County Intervenors as for the Cuyahoga County plaintiffs. Accordingly, the motion for preliminary injunction as to the Mahoning County Intervenors is also granted, as follows: defendants are hereby enjoined from enforcing Canon 7(C)(6) of the Ohio Code of Judicial Conduct against intervenors Smith, Durkin, and Lisotto.

During the status conference with the court, defendants expressed an additional concern that an injunction prohibiting enforcement of Canon 7(C)(6) against a given judicial candidate would be unfair if the injunction did not also apply to prohibit enforcement of the Canon against the *opponent* of that candidate. In other words, defendants argued that if the court's injunction allows a judicial candidate to spend more than $75,000 during an election, equity and fairness mandated that the judicial candidate's opponent must also be allowed to spend more than $75,000. No party to this litigation (including Russo) has objected to this position, and the court agrees. Accordingly, the court expands its injunctive relief as follows: defendants are hereby enjoined from enforcing Canon 7(C)(6) of the Ohio Code

of Judicial Conduct against the election opponents of all those parties to whom it has otherwise granted injunctive relief in this case.

Finally, the court notes that its Orders granting preliminary injunctive relief in this case, although confined to the individual plaintiffs and their opponents, do speak to enforcement of Canon 7(C)(6) against other judicial candidates. "[A]s a practical matter, [the] injunctive relief [awarded to plaintiffs] will lead to complete relief for the potential class [of all judicial candidates,] because defendant [should] voluntarily treat all alike thereafter." *Zepeda v. United States I.N.S.*, 753 F.2d 719, 729 n.1 (9th Cir. 1983); *see also Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973), *cert. denied*, 417 U.S. 936 (1974) (class certification "is largely a formality" because "the judgment run[s] to the benefit not only of the named plaintiffs but of all others similarly situated"). The court appreciates the comprehensive briefing all parties have provided, on an expedited basis, to date.

IT IS SO ORDERED.

/s/

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED

98 737 OCT 28 1998

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

JONATHAN W. MARSHALL, et al.,

Petitioners,

v.

RONALD SUSTER, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI
APPENDIX VOLUME II OF II

BETTY D. MONTGOMERY
Attorney General
MICHAEL J. RENNER
Chief Counsel
Counsel of Record
ELISE W. PORTER
Assistant Attorney General
Office of the Attorney General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 644-8903
(614) 466-5087 (fax)

Counsel for Petitioners

55 pp

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RONALD SUSTER, et al.,	:	Case No.: 1:96 CV 1736
	:	
Plaintiffs	:	JUDGE SOLOMON OLIVER, JR.
	:	
v.	:	
	:	
JONATHAN W. MARSHALL, et al.,	:	
	:	
	:	AMENDED ORDER
Defendants	:	(September 25, 1996)

Plaintiffs Ronald Suster and Patricia Cleary, both of whom currently serve as Judges on the Cuyahoga County Court of Common Pleas, bring this action against the following defendants: (1) Jonathan Marshall, Secretary of the Ohio Supreme Court Board of Commissioners on Grievances and Discipline ("Discipline Board"); (2) Robin Weaver, Chair of the Discipline Board; (3) David Evans, Vice Chair of the Discipline Board; and (4) all seven of the current Ohio Supreme Court Justices. Plaintiffs Suster and Cleary bring this action to challenge the constitutionality of provisions in the Ohio Code of Judicial Conduct that limit judicial campaign expenditures.

Currently pending is plaintiffs' motion for preliminary injunction (docket no. 3). On September 3, 1996, the Court heard oral argument regarding this motion. For the reasons stated below, the motion for preliminary injunction is GRANTED IN PART and DENIED IN PART. In particular, the Court enjoins enforcement against plaintiffs of Canon 7(C)(6) of the Ohio Code of Judicial Conduct, which places a ceiling on the amount of funds a candidate may spend during a

judicial race, finding that Canon unconstitutional, but does not enjoin enforcement of Canon 7(C)(8), which prohibits a candidate in a judicial race from utilizing funds raised while running for non-judicial offices.

I. Findings of Fact

None of the material facts in this case are in dispute. As noted, plaintiffs Ronald Suster and Patricia Cleary are both currently serving as Judges on the Cuyahoga County Court of Common Pleas. Judge Suster was appointed to this position in October of 1995; prior to that time, he served as an elected member of the Ohio House of Representatives. Judge Suster's term as Judge expires on December 31, 1996. Judge Cleary was elected to her position in 1994, and her term ends on December 31, 2000. Both plaintiffs are attorneys and registered voters in Cuyahoga County.

Suster is currently seeking to retain his position as Judge by running for election. Judge Suster won the primary election on March 19, 1996, and is now campaigning for the general election, to be held November 5, 1996. As an incumbent Judge and candidate for judicial office, he is subject to the Ohio Code of Judicial Conduct ("Judicial Code"). The Judicial Code is promulgated by the seven Ohio Supreme Court Justices named as defendants. Defendants Marshall, Weaver, and Evans have primary responsibility for initiating enforcement of the Judicial Code, through their initial review of all grievances relating to Judicial Code violations. Violations of the Judicial Code may lead to disciplinary sanctions, fines, and related punishment.

Canons 7(C)(6)(d)[1] and 7(C)(8) of this Judicial Code

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[1]Although the parties refer in their briefs to Canon 7(C)(6)(a)(iv), they mean to cite Canon 7(C)(6)(d). Canon

limit the amounts and sources of funds that a judicial candidate may spend during a judicial campaign. Specifically, Canon 7(C)(6)(d) states in relevant part that "the total amount of expenditures made in the fund raising period . . . by the campaign committee of a judicial candidate shall not exceed . . . seventy-five thousand dollars in the case of a judicial candidate for the court of common pleas." Canon 7(C)(8) states, inter alia, that "[a] judicial candidate shall not expend funds in a judicial campaign that have been contributed to him or her to promote his or her candidacy for a nonjudicial office."[2] Suster and Cleary challenge these provisions, seeking: (1) a declaratory judgment that the provisions violate their right to

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7(C)(6)(a)(iv) was renumbered to be Canon 7(C)(6)(d) when the Canon was amended on February 20, 1996. This amendment, in turn, was brought about when plaintiff Suster challenged the Judicial Code's then-existing spending limits applicable to primary elections. *See Suster v. Board of Comm'rs on Grievances & Discipline of the Supreme Ct. of Ohio*, Case No. 96-CV-0235 (N.D. Ohio Feb. 20, 1996) (Gaughan, J.) ("*Suster I*"). *Suster I* was resolved when the defendants in that case signed a Final Consent Decree agreeing not to enforce Canons 7(C)(6)(b & c) (July 1, 1995), which, *inter alia*, had limited Suster's primary campaign spending to $18,750. The same day Judge Gaughan entered this Final Consent Decree in *Suster I*, the Ohio Supreme Court, over Justice Pfeiffer's dissent, amended Canon 7 to delete provisions 7(C)(6)(b & c) (July 1, 1995), which led to the renumbering.

[2]Canon 7(C)(8) goes on to state: "A judge or judicial candidate shall not contribute or expend campaign funds in support of or opposition to a candidate for a public office, other than the public office to which the judge or judicial candidate is seeking election." Defendants do not challenge this portion of Canon 7(C)(8).

free speech, guaranteed by the First Amendment to the Constitution; (2) a declaratory judgment that the provisions violate their right to substantive due process; and (3) damages and attorney's fees, pursuant to 42 U.S.C. §§ 1983 and 1988.

In their role as judges, both Suster and Cleary challenge Canon 7(C)(6) as violative of their First Amendment rights. Suster has already spent about $73,000 during his primary campaign. Thus, under Canon 7(C)(6)(d), Suster may spend only about $2,000 more before he reaches his limit. Because Suster wants to spend more than an additional $2,000 pursuing his campaign during the general election, he challenges this provision. Cleary adds that she wants to spend more than a total of $75,000 when she runs for re-election in 2000, so she challenges this provision as well.

Also in his role as judge, Suster alone challenges Canon 7(C)(8) as violative of his First Amendment rights. Suster successfully ran for election as a state representative, he maintained a campaign committee called "Friends of Ron Suster." This committee managed a bank account into which it placed campaign contributions. Today, the committee's bank account still contains a positive cash balance of about $54,000. Suster would now like to spend some or all of this money on his present judicial campaign, but he is limited from doing so by Canon 7(C)(8). Thus, he challenges the limitation that he may not spend campaign funds raised during his past campaign for election as state representative on his present campaign for election as judge.

Finally, in their role as registered voters, Suster and Cleary challenge both Canons as violative of their First Amendment rights. Suster and Cleary note they are registered to vote in Cuyahoga County. In their role as potential voters -- not as judicial candidates -- Suster and Cleary complain that the challenged Canons serve to abridge the total amount of

campaign speech a judicial candidate may utter. Plaintiffs avow that, as voters, they would like to consume as much political campaign speech as judicial candidates might wish to express. Thus, plaintiffs challenge both spending limits as violations of their right to hear political speech.[3]

II. Conclusions of Law

This Court must consider and balance the following four factors in deciding whether to issue a preliminary injunction:

(1) whether the plaintiff has a substantial likelihood of success on the merits;

(2) whether the plaintiff will suffer irreparable injury if the relief is not granted;

(3) whether the order would cause substantial harm to others; and

(4) whether the public interest would be served by issuing the order of injunction.

Mason Cty. Med. Ass'n v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977). These four factors "do not establish a rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief." *Frisch's Restaurant, Inc. v. Shoney's, Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985). Rather,

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[3]Defendants suggested at oral argument that plaintiff Cleary may not have standing to pursue the claims advanced in the complaint. The Court does not address this issue because it is clear that plaintiff Suster, at least, does have standing to pursue all claims made.

they are "factors to be balanced, not prerequisites that must be met." *Id.* In this regard, no single factor is determinative. The Court must weigh and balance each of these factors in light of the factual circumstances of the particular case. *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement,* 688 F. Supp. 1245, 1248 (N.D. Ohio 1988). A balancing of these four factors in this case demonstrates that plaintiffs are entitled to part, but not all, of the injunctive relief they seek.

A. Canon 7(C)(6)

1. Likelihood of Success on the Merits

The legal analysis for any challenge to laws governing campaign finances must start with *Buckley v. Valeo,* 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976). In *Buckley,* the Supreme Court examined certain federal campaign expenditure ceilings and campaign contribution restrictions. The High Court determined that "[political campaign] contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Id.* at 19. The Court stated that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* Because such restrictions "burden[] core political speech, [a court must] apply 'exacting scrutiny,' and . . . uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334, 115 S. Ct. 1511, 1519, 131 L. Ed. 2d 426 (1995).

As of 1985, the only "legitimate and compelling government interests thus far identified for restricting campaign finances" by the Supreme Court were "preventing corruption or

the appearance of corruption." *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97, 84 L. Ed. 2d 455, 105 S. Ct. 1459 (1985) ("*NC-PAC*"). In 1990, the Supreme Court identified an additional interest, limiting "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S. Ct. 1391, 1397, 108 L. Ed. 2d 652 (1990). This latter compelling state interest is not implicated in this case.

The Supreme Court thus teaches that a statute may constitutionally restrict campaign finances to prevent corruption or the appearance of corruption, but the statute must do so in a narrowly tailored way. Moreover, a statute tending to infringe First Amendment freedoms must be so narrowly tailored that it infringes those freedoms by the least restrictive means possible. *Anderson v. Celebrezze*, 460 U.S. 780, 806, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983) ("if the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a . . . scheme that broadly stifles the exercise of fundamental personal liberties"); *see also Brown v. Hartlage*, 456 U.S. 45, 53, 71 L. Ed. 2d 732, 102 S. Ct. 1523 (1982) (a "restriction [must] operate without unnecessarily circumscribing protected expression").

In its analysis of the compelling state interest of preventing corruption, the Supreme Court has noted that "the hallmark of corruption is the financial quid pro quo: dollars for political favors." *NC-PAC*, 470 U.S. at 497. As such, limits on the amount of money an entity may contribute to a candidate's campaign may be, if narrowly tailored, constitutional. *E.g.*, *Buckley*, 424 U.S. at 29 (upholding limits on the amount of money a person can contribute to the campaign of a candidate for certain elected federal positions). The reason behind

contribution limits is obvious -- extremely large contributions may, or at least will appear to, buy political influence. Narrowly tailored limits on the size of campaign contributions, therefore, are constitutionally permitted to avoid corruption, even though such limits may serve to reduce the total amount of money a candidate has available for disseminating his political speech.

Limits on campaign *contributions*, however, are qualitatively different from limits on campaign *expenditures*. There is a "fundamental constitutional difference between money spent to advertise one's views . . . and money contributed to the candidate to be spent on his campaign." *NC-PAC*, 470 U.S. at 497. A cap on the amount a candidate may spend in pursuit of elected office has little nexus to prevention of corruption or its appearance: unlike a campaign contributor, a candidate's dollars are traded not for possible political favors but for "political communication" through buying handbills, hiring halls for speeches and rallies, and purchasing advertising in broadcast and print media. *Buckley*, 424 U.S. at 19. Thus, not even the governmental interest of preventing corruption or the appearance of corruption will normally "justify the restriction on the quantity of political expression imposed by . . . campaign expenditure limitations." *Id.* at 55. As the Eighth Circuit noted recently, it is difficult "to discern how the interests of good government could possibly be served by campaign expenditure laws that necessarily have the effect of limiting the quantity of political speech in which candidates for public office are allowed to engage." *Shrink Missouri Government Political Action Comm. v. Maupin*, 71 F.3d 1422, 1426 (8th Cir. 1995), *cert. denied*, 135 L. Ed. 2d 1094, 116 S. Ct. 2579 (1996) (noting also that although "the state's interest in reducing corruption . . . constitute[s] a compelling state interest, the state has failed to explain how the campaign spending limits . . . are narrowly tailored to serve this interest").

In the face of this overwhelming authority disfavoring the campaign spending limits contained in Canon 7(C)(6), defendants attempt to distinguish *Buckley, Shrink Missouri*, and other such cases by arguing that those cases addressed only campaign spending on non-judicial elections. Defendants argue that "judicial election speech" is different from "legislative election speech," and that limiting the former through campaign spending limits is different from limiting the latter because of aspects unique to the position of judge.

In support of this notion, defendants quote case law stating that "because the judicial office is different in key respects from other offices, the state may regulate its judges with the differences in mind." *Morial v. Judiciary Comm'n of State of Louisiana*, 565 F.2d 295, 302 (5th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 1013, 56 L. Ed. 2d 395, 98 S. Ct. 1887 (1978). As examples, defendants note that states may: forbid judicial candidates from identifying their party affiliation on the ballot, *Haffey v. Taft*, 803 F. Supp. 121, 125-26 (S.D. Ohio 1992); prohibit judges from publicly endorsing other candidates for public office, *In re Code of Judicial Conduct*, 603 So. 2d 494, 498-99 (Fla. 1992); disallow judicial candidates from personally soliciting campaign contributions, *Stretton v. Disciplinary Bd. of Supreme Ct. of Pennsylvania*, 944 F.2d 137, 144 (3rd Cir. 1991); and ban judicial candidates from announcing their views on disputed legal or political issues likely to come before them as judges, *id.* at 146. Such restrictions on candidates for non-judicial office, of course, would almost certainly be unconstitutional. *See id.* at 142 (the state's "right to restrict the speech of its candidates for legislative and executive offices does not extend so far as to 'select which issues are worth discussing or debating' . . . in the course of the campaign") (quoting *Brown*, 456 U.S. at 45, 60) (some internal quotation marks omitted).

Although defendants construct an interesting argument, the Court does not find it persuasive. The cases cited by defendants are directed to regulations governing the permissible content of a judicial candidate's speech. Canon 7(C)(6) does not regulate content, but regulates the quantity of a judicial candidate's speech.[4] Narrowly tailored regulation of the content of a judicial candidate's speech has been held constitutional because such regulations can serve to avoid the appearance of corruption. As an example, a judicial candidate's campaign promise always to rule in favor of employers in labor disputes is practically a solicitation of dollars from employers, in exchange for favorable rulings. Restrictions on campaign speech prohibiting a judicial candidate from announcing his views on "disputed legal or political issues . . . likely to come before the court" are permissible, therefore, to avoid this apparent and real quid pro quo corruption. *Stretton,* 944 F.2d at 144.

Defendants cite no case, and the Court cannot find one, standing for the proposition that regulations which, through campaign spending limits, restrict the *quantity* of speech a judicial candidate is otherwise allowed to express, are constitutional. The reason for this, as noted, is that there is virtually no link between campaign expenditure limits and the prevention of corruption. Regardless of whether a candidate is pursuing judicial, legislative, or executive office, any political favors he might owe correlate with the size of his campaign contributions, not the size of his expenditures. Because the Canon challenged here is directed entirely toward limiting the quantity of a judicial candidate's political speech, not its content, the cases cited by defendants are largely inapposite.

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[4]Compare Canon 7(B)(2)(b-f) of the Judicial Code, which regulates the content of a judicial candidate's speech.

This is not to say defendants have failed to identify any important state interests that the challenged Canons might serve. One such interest identified by defendants is having "judges be judges, not campaign managers." It is fair to say that a state has a legitimate and strong interest in ensuring scarce judicial resources be directed as much as possible toward resolving disputes brought to its courts, not in election efforts. *See* Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 Harvard C.R-C.L. L. Rev. 187, 193-95 (1996) (demonstrating that judicial campaigns have become increasingly time-consuming and expensive, and citing the example that "in 1986, two candidates for chief justice of the Supreme Court of Ohio spent in excess of $2,700,000, up from $100,000 six years earlier"). Defendants also assert the substantial state interest of ensuring the independence of the state judiciary and public confidence and trust in its elected judges. These are also strong and legitimate state interests, about which defendants are rightly concerned. In fact, defendants cite a poll of Ohio citizens, undertaken by the Citizen's Committee on Judicial Elections,[5]

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[5]The Citizen's Committee on Judicial Elections was established by the Ohio Supreme Court in 1994 to conduct a thorough review of Ohio's judicial election system. The Committee issued its report, known as the "McQuade Report" (named after the Committee Chairman, Judge Richard B. McQuade, Jr.), in January of 1995. The Committee suggested a number of reforms to the Judicial Code to increase the public's trust in its judiciary. Interestingly, however, the McQuade Report did not propose campaign expenditure limits, noting that "mandatory expenditure limits in non-judicial races have been determined to be unconstitutional." Report at 7. *See also* letter from Richard B. McQuade to Ohio Chief Justice Thomas Moyer (March 29, 1995) (stipulation exhibit 8) (explaining at length why the Citizen's Committee on Judicial Elections believed campaign spending limits were unconstitutional and bad policy).

which reports that: (1) 90% of the citizenry believe judicial decisions are influenced by campaign contributions at least some of the time; and (2) these citizens believe limiting total campaign spending is the most effective way to alleviate this problem. This poll reveals that public confidence in its elected judiciary is sadly low, and the Court accepts that the State does have a substantial interest in securing public trust in the judiciary.[6], [7]

Even assuming these state interests are "compelling" and "overriding," however, defendants have failed to show that the restrictions placed upon a judicial candidate's campaign speech by Canon 7(C)(6) are "narrowly tailored" to serve these interests. *McIntyre*, 115 S. Ct. at 1519. As noted, the exacting scrutiny this Court must apply requires the Canon to serve the state's interests by the least restrictive means possible. *Anderson v. Celebrezze*, 460 U.S. 780, 806, 75 L. Ed. 2d 547, 103 S. Ct. 1564 (1983). In this case, it does not. Regarding the first state interest, the Canon does not ensure that "judges will be judges,

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[6]Loss of the public trust in the elected judiciary, however, is not new. Ninety years ago, Roscoe Pound noted that "Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench." *See* Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 Fla. L. Rev. 529, 535 (1991) (citation omitted).

[7]Defendants cite a third state interest in support of the challenged provisions: to "level the playing field" between judicial candidates. The Supreme Court, however, has clearly stated that "leveling the playing field" is not a compelling state interest: campaign spending limits are not justified by a desire to "enhance the relative voice" of some candidates over others. *Buckley*, 424 U.S. at 48-49.

not campaign managers." When judges are elected, not appointed, they are obliged to manage an election campaign. This is true regardless of how much they may be allowed to spend. Indeed, an argument may be made that judges will have to spend *more* time campaigning under a $75,000 campaign expenditure limit than under no limit -- judges will be forced to make up for lack of wide-dispersion speech, via expensive television ads, by spending even more time making numerous speeches to smaller groups.

Further, defendants have not shown, and cannot show, that campaign expenditure limitations in and of themselves ensure the independence of the judiciary. The Supreme Court has stated clearly that while limiting campaign contributions may ensure the independence of elected candidates, by limiting the opportunity for "quid pro quo" political favors, limits on campaign expenditures do not have any direct nexus to this type of corruption. *Buckley*, 424 U.S. at 54-57; *see also Shrink Missouri*, 71 F.3d at 1426. Limiting the size of campaign contributions can ensure a judge is not beholden to a large contributor; limiting the candidate's expenditures does not have this effect. Thus, the limit on total campaign expenditures imposed by Canon 7(C)(6) is simply not narrowly tailored to achieve the state interest of ensuring the independence of the judiciary.

Finally, the defendants have not shown Canon 7(C)(6) is narrowly tailored to improve the public's confidence and trust in its elected judges. To the contrary, the Canon is not tailored toward serving this interest at all -- the spending limits as promulgated apply to judicial candidates extremely unequally. For example, a candidate for judge in the court of common pleas in Cuyahoga County, which has a population of over 900,000 registered voters, is limited to spending 8.3 cents per voter; a candidate in Vinton County, which has about 7,500 registered

voters, is limited to spending $10 per voter.[8] Presumably, a voter could thus trust a candidate from Cuyahoga County more than one from Vinton County. This is not "narrow tailoring." Moreover, in summarizing the results of the citizens poll, the accompanying report notes that "spending limits can provide an undue advantage to incumbents and candidates with well-known names." McQuade Report at 7. As such, campaign spending limits carry their own problems and may not improve the public's trust in its judges at all. Finally, it appears there are available more narrowly tailored methods of improving the public's confidence that elected judges will not favor campaign contributors, not the least of which include enforcing and publicizing existing ules regarding contribution limits,[9] or mandating a judge's recusal if a party or attorney has made campaign contributions of a certain size.[10]

In the end, overwhelming and recent case law shows that rules limiting the total amount of judicial campaign expenditures, as does Canon 7(C)(6), are unconstitutional as a violation of the right to free speech.[11] *E.g.*, *Shrink Missouri*, 71

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[8]Defendants' counsel graphically illustrated this difference at oral argument by noting that the Cuyahoga County candidate could not send a postcard to each voter, while the Vinton County candidate could buy each voter a (tough) steak dinner.

[9]For example, a non-family individual may not contribute more than $250 to the campaign of a judicial candidate for county court. Canon 7(C)(5)(a)(i).

[10]Current rules regarding recusal are contained in Canon 3(C, D).

[11]Academic articles add that rules limiting the total amount of judicial campaign expenditures are probably

F.3d at 1426 (no compelling state interests are "served by campaign expenditure laws that necessarily have the effect of limiting the quantity of political speech in which candidates for public office are allowed to engage"). Canon 7(C)(6) does not withstand the "exacting scrutiny" required to pass constitutional muster. As to this Canon, therefore, plaintiffs have a very high likelihood of success on the merits.

2. Other Factors

There is little question that a violation of plaintiffs' right to free speech is an irreparable injury. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief").

Also, there appears to be no substantial harm that would come to others if the injunction is granted. Defendants have identified no one whom an injunction would injure. There would certainly be no injury to plaintiffs' election opponents; an injunction declaring unconstitutional, and prohibiting enforcement of, a campaign expenditure cap would affect all judicial candidates equally.

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ineffective, as well. *See* Roy A. Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J. of Law & Politics 57, 121-22 (1985) (reciting numerous reasons campaign spending caps do not work).

Finally, the public interest would certainly be served by issuing an order enjoining enforcement of a rule that serves to limit "core political speech." *McIntyre*, 115 S. Ct. at 1519. There is no public interest in enforcing a law that "curtail[s] debate and discussion" regarding issues of political import. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal.*, 454 U.S. 290, 299, 70 L. Ed. 2d 492, 102 S. Ct. 434 (1981).

Because all of the four factors the Court must consider and balance in deciding whether to issue a preliminary injunction regarding Canon 7(C)(6) weigh in favor of plaintiffs, the preliminary injunction is GRANTED, as follows: (1) the Court declares that Canon 7(C)(6) of the Ohio Code of Judicial Conduct is unconstitutional; and (2) defendants are hereby enjoined from enforcing Canon 7(C)(6) of the Ohio Code of Judicial Conduct against plaintiffs.[12]

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[12]The Court grants injunctive relief in favor only of plaintiffs, and not other judges against whom defendants might seek to enforce Canon 7(C)(6), because the Court "may not attempt to determine the rights of persons not before the court . . . [and] must, therefore, tailor the injunction to affect only those persons over which it has power." *Zepeda v. United States I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). *See also Califano v. Yamasaki*, 442 U.S. 682, 702, 61 L. Ed. 2d 176, 99 S. Ct. 2545 (1979) (injunction should be "narrowly tailored to give only the relief to which plaintiffs are entitled"); *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989), *cert. denied*, 496 U.S. 937, 110 L. Ed. 2d 664, 110 S. Ct. 3217 (1990) ("classwide relief . . . is appropriate only where there is a properly certified class").

B. *Canon 7(C)(8)*

1. *Likelihood of Success on the Merits*

Sentence one of Canon 7(C)(8) prohibits a judicial candidate from spending funds on a campaign for judicial office if those funds were raised while campaigning for a non-judicial office. Such a shifting of funds raised during one campaign to support another campaign is generically known as "intra-candidate transfers." *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1315 (9th Cir. 1992), *cert. denied*, 505 U.S. 1230, 120 L. Ed. 2d 922, 112 S. Ct. 3056, 112 S. Ct. 3057 (1992). It is clear that a ban on such transfers works to limit political speech: if plaintiff Suster could use, during his present judicial campaign, the $54,000 he raised while campaigning for election to the state legislature, he could give voice to more "political communication" through buying postage for campaign literature, hiring halls for rallies, and purchasing advertising. *Buckley*, 424 U.S. at 19; *Service Employees*, 955 F.2d at 1322. As with Canon 7(C)(6), then, Canon 7(C)(8) infringes upon plaintiffs' First Amendment rights by limiting total campaign expenditures. Accordingly, Canon 7(C)(8) must be declared unconstitutional unless "it is narrowly tailored to serve an overriding state interest." *McIntyre*, 115 S. Ct. at 1519.

In support of their position that Canon 7(C)(8) is not narrowly tailored, and thus that they are likely to win on the merits, plaintiffs cite *Service Employees* and *Shrink Missouri*. Both of these cases involved challenges to, *inter alia*, provisions prohibiting intra-candidate transfers.[13] In both cases, the elected

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[13]The statute at issue in Service Employees prohibited "transfer of funds between controlled committees of a single candidate." *Service Employees*, 955 F.2d at 1315. The statute

officials whom the statutes prohibited from engaging in intra-candidate transfers included judges.[14] And in both cases, the courts struck down the statutes prohibiting transfers, holding the statutes were unconstitutional. Specifically, the Service Employees court ruled:

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at issue in Shrink Missouri prohibited a candidate from "carry-over from one campaign to the next of any but very small amounts of funds," by mandating that money raised but not spent during a campaign be returned to contributors or forfeited to the state ethics commission. *Shrink Missouri*, 892 F. Supp. 1246, 1253; *Shrink Missouri*, 71 F.3d at 1427.

[14]Contrary to defendants' suggestion at oral argument, the Missouri statute challenged in *Shrink Missouri* applied to all elected officials, including judges. Missouri amended its State Constitution in 1976 to provide that Justices and Judges are initially appointed to the state Supreme Court and certain lower courts. These judges must run for re-election, however, and other judges are popularly elected both initially and thereafter. Office of the Secretary of State of the State of Missouri, *Official Manual: State of Missouri 1995-1996* 192 (1995) (Steven N. Ahrens, ed.); *see also* 30 The Council of State Governments, *The Book of the States 190-92* (1994-95) (the fifty States either (1) popularly elect their judges, (2) select judges by legislative or executive appointment, or (3) use a hybrid approach; Missouri uses the third method). The ruling in *Shrink Missouri*, therefore, applied to judicial *and* non-judicial elections. The California statute challenged in *Service Employees* also applied to all elected officials, including judges. *See* Cal. Govt. Code § 82023 ("'Elective office' means any state, regional, county, municipal, district *or judicial office* which is filled at an election") (emphasis added).

> It is clear that the ban acts as an expenditure limitation; such limitations have never been upheld, save in connection with the expenditures of corporations [referring to *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S. Ct. 1391, 108 L. Ed. 2d 652 (1990)]. Moreover, the sole justification offered for the [intra-candidate] transfer ban, is a notion that contributions given for one office ought not be diverted to another, because the donation was solicited and given with a particular office in mind. This "trust" theory, which suggests donations are premised upon the office rather than the candidate, may, of course, sometimes be true; on the other hand, as evidence in this trial demonstrated, it is sometimes false. More to the point, it is clear that to the extent the provision is intended to insure truth in soliciting, a narrower and more efficacious means is readily at hand. Such a purpose is easily served by requiring that the candidate inform potential donors of his intentions, or if he is unable to do so, to acknowledge that the sums raised could be expended on other races.

Service Employees, 747 F. Supp. 580; *see also Service Employees*, 955 F.2d at 1322 (agreeing with the district court's analysis).

Similarly, the *Shrink Missouri* court held:

> The [laws banning intra-candidate transfers] clearly limit political speech by telling a candidate when he or she must speak, that is, by stating that the money must be spent in the particular campaign in which it was raised.

> Defendants assume that contributors always wish to contribute to a candidate for a particular campaign, and that a general contribution to a candidate, which that candidate could use for current or future campaigns, must constitute an impermissible attempt at improper *quid pro quo* influence. The Court disagrees, and thinks it is entirely legitimate for a contributor to give money to a candidate because the contributor supports that candidate, in whatever race the candidate may later choose to run. This type of "blind support" does not necessarily imply that the contributor expects favors, but rather that the contributor supports the candidate because of the candidate's particular views or politics -- the very essence of protected political speech. The dangers of quid pro quo corruption are adequately addressed by the overall contribution limits [contained in the statute].

Shrink Missouri, 892 F. Supp. at 1254 (emphasis in original); *see also Shrink Missouri*, 71 F.3d at 1427-28 (agreeing with the district court and noting that the statute was not narrowly tailored).

Service Employees and *Shrink Missouri* do lend support to plaintiffs' position. This Court finds both cases distinguishable, however, because neither case focused on the peculiarities of the elected position of judge. In neither case were any of the litigants judicial candidates.[15] Thus, in neither

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[15]In Service Employees, plaintiffs included "a number of elected state officials, various campaign committees, labor organizations, and a contributor to political campaigns," as well as intervenor plaintiff the *Democratic Party*, 747 F. Supp. at

case did the parties argue, nor did the courts consider, the more particular compelling state interest of avoiding corruption or the appearance of corruption of elected judges. Both the *Service Employees* and *Shrink Missouri* courts heard arguments from candidates to non-judicial elected office, and ruled that provisions limiting intra-candidate transfers were unconstitutional as applied to *all* elected offices. Given that plaintiffs in this case are judges, the Court has been presented with meaningfully different arguments.

Specifically, the defendants offer the compelling state interest that prohibition of intra-candidate transfers ensures judicial candidates do not violate other Canons of the Judicial Code, which govern judicial campaigning. As examples, defendants note that other provisions of the Judicial Code restrict a judicial candidate's speech in the following ways: (1) limiting to $250 the amount an individual, other than a family member, may contribute to a candidate's campaign for judge on a court of common pleas, Canon 7(C)(5)(a)(i); (2) prohibiting candidates from promising how they will rule on matters that may come before them, or even expressing views on such matters, Canon 7(B)(2)(c-e); and (3) prohibiting candidates from soliciting campaign funds personally, Canon 7(C)(2)(a).

Defendants then correctly note that Canon 7(C)(8), which bans intra-candidate transfers, helps to ensure judicial candidates will not avoid the restrictions contained in these other Canons. For example, a person who runs for state *legislative* office (as has plaintiff Suster) may legally: (1) endorse the death penalty for all felons who deal drugs, or alternatively endorse commutation of all current death penalty

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581. In *Shrink Missouri*, plaintiffs included two candidates who had run for legislative office and also a political action committee, 892 F. Supp. at 1248.

sentences to life in prison; (2) write personal letters soliciting campaign funds based on his death penalty views; and (3) accept two $2,500 campaign contributions from an individual who responds favorably to his letter.[16] The Judicial Code prohibits a candidate for judicial office from doing any of these things. Defendants thus argue that Canon 7(C)(8) serves the compelling state interests of: (1) ensuring the integrity of the judiciary; and also (2) ensuring fairness between judicial candidates by preventing all candidates, equally, from using contributions gained through forbidden judicial campaign speech. While not suggesting the plaintiffs in this case have done so, defendants add that a judicial candidate might even purposely amass a "war chest" during a campaign for non-judicial office (using tactics disallowed by the Judicial Code), all the while planning to use these funds for a later judicial campaign.

As an initial matter, the Judicial Code's prohibitions of a candidate's personal solicitation of campaign contributions, and expression of views on matters that may come before them, appear constitutional. *Stretton v. Disciplinary Bd. of Supreme Ct. of Pennsylvania*, 944 F.2d 137 (3rd Cir. 1991). In *Stretton*, a judicial candidate "sought an injunction against enforcement of Canon 7 of the [Pennsylvania Code of Judicial Conduct], which bars candidates from announcing their views on disputed legal or political issues and also prohibits personal solicitation of campaign funds." *Id.* at 139. The court, however, denied the request for injunctive relief. First, the Stretton court noted that "a state has a compelling interest in the integrity of its judiciary." *Id.* at 142; *Morial v. Judiciary Comm'n of State of Louisiana*,

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[16]A candidate for the state legislature may accept a $2,500 contribution from an individual during the campaign for primary election, and another $2,500 contribution from the same individual during the campaign for general election. Ohio Rev. Code § 3517.102(B)(1)(a-c).

565 F.2d 295, 302 (5th Cir. 1977) (en banc), *cert. denied*, 435 U.S. 1013, 56 L. Ed. 2d 395, 98 S. Ct. 1887 (1978) ("the state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect"). The court then found that the provision limiting the content of a judicial candidate's speech "serves that end," *Stretton*, 944 F.2d at 142, because "the public has a right to expect that a court will make an assessment of the facts based on the evidence submitted in each case, and that the law will be applied regardless of the personal views of the judge. Taking a position in advance of litigation would inhibit the judge's ability to consider the matter impartially." *Id.* at 144.

The *Stretton* court also upheld the prohibition of personal solicitation of campaign funds, noting that "the stake of the public in a judiciary that is both honest in fact and honest in appearance is profound . . . . A judge's direct request for campaign contributions offers a *quid pro quo* or, at least, can be perceived by the public to do so. Insulating the judge from such direct solicitation eliminates the appearance (at least) of impropriety and, to that extent, preserves the judiciary's reputation for integrity." *Id.* at 145 (quoting *In re Fadeley*, 310 Ore. 548, 802 P.2d 31, 40 (Or. 1990)).

As in *Stretton*, Canons 7(B)(2)(c-e) and 7(C)(2)(a) of the Ohio Judicial Code prohibit judicial candidates from personal solicitation of campaign funds and from announcing their views on disputed legal or political issues that may come before them. These Canons appear to be constitutional, and plaintiffs do not challenge them here. The provisions are designed to ensure the actual and apparent impartiality of the judiciary, and to avoid the actual or apparent quid pro quo corruption of judges.

Canon 7(C)(8) is designed to serve these same compelling state interests. The Canon prevents a judicial

candidate from using, in a judicial campaign, money that was likely raised through personal solicitation and/or in response to a candidate's views on disputed legal or political issues. Returning to the example mentioned above, Canon 7(C)(8) ensures a judicial candidate may not spend money campaigning for a judgeship if the money was raised through a personal solicitation letter advocating execution of drug felons or commutation of all death penalty sentences. This is entirely legitimate as a way to prohibit *quid pro quo* judicial rulings. Moreover, Canon 7(C)(8) serves to ensure all judicial candidates are protected equally: no judicial candidate, regardless of the nature of his prior campaigns for elected office, may use funds collected during a non-judicial campaign.

Not only does Canon 7(C)(8) serve a compelling state interest, it is narrowly tailored to further it. The Canon does not restrict a candidate for legislative or executive office from using funds raised in a previous legislative or executive, or even judicial, campaign. Nor does the Canon disallow a candidate for judicial office from using funds raised in a previous judicial campaign. Thus, despite Canon 7(C)(8), plaintiff Suster may: (1) use the funds maintained by the "Friends of Ron Suster" committee to campaign for legislative or executive office; (2) use funds raised during his present judicial campaign for a subsequent judicial campaign; and (3) even use funds raised during his present judicial campaign for a subsequent legislative or executive campaign. Canon 7(C)(8) only disallows Suster from campaigning for judicial office with funds raised during a previous campaign for legislative or executive office. And, of course, Canon 7(C)(8) leaves available to Suster campaign fund sources other than the "Friends of Ron Suster" bank account.

In sum, the Court finds *Service Employees* and *Shrink Missouri* distinguishable, and further finds that plaintiffs are not likely to succeed on the merits of their argument that Canon 7(C)(8) is unconstitutional. The ban contained in that Canon,

prohibiting intra-candidate transfers of campaign funds to judicial candidates, is narrowly tailored to serve the compelling state interest of ensuring that judges be and appear to be impartial, and the related interest of avoiding actual and apparent judicial corruption. Because Canon 7(C)(8) survives this exacting scrutiny, plaintiffs are not likely to succeed on the merits.

2. *Other Factors*

As noted above in the context of discussing Canon 7(C)(6), "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 49 L. Ed. 2d 547, 96 S. Ct. 2673 (1976). To some extent, then, the second factor weighs in favor of plaintiffs, because their First Amendment rights are infringed by Canon 7(C)(8). This infringement, however, is no more than is necessary to further compelling state interests. The Court also notes that plaintiffs' injury is tempered somewhat in that the barriers limiting their opportunity to engage in unlimited political speech are greatly relieved by the Court's granting of the injunction relative to Canon 7(C)(6); Suster may spend more than $75,000 pursuing his campaign, but he must use funds other than those in the "Friends of Ron Suster" bank account.

Regarding the third factor, there does appear to be a substantial harm that would come to others if the injunction regarding Canon 7(C)(8) is granted. Judicial candidates who do not have access to a "war chest" compiled during campaigns for non-judicial offices would be at a severe disadvantage if those who do have such war chests, gained through tactics disallowed by the Judicial Code, could use them. Granting the requested injunction would allow some judicial candidates to enjoy benefits others cannot obtain. This factor weighs against granting the injunction; denying the injunction protects all judicial candidates equally.

Finally, the public interest factor weighs most heavily for defendants. As noted, "the state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect." *Morial*, 565 F.2d at 302. Canon 7(C)(8) helps to serve this interest, while limiting a judicial candidate's speech only so much as is necessary.

Weighing all four factors together, the Court concludes that the circumstances preponderate in favor of defendants, and a preliminary injunction enjoining enforcement of Canon 7(C)(8) is not appropriate in this case. Accordingly, the preliminary injunction is DENIED, as follows: (1) the Court declares that sentence one of Canon 7(C)(8) of the Ohio Code of Judicial Conduct is not unconstitutional; and (2) defendants may continue to enforce Canon 7(C)(8) of the Ohio Code of Judicial Conduct.

IT IS SO ORDERED.

Solomon Oliver, Jr.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RONALD SUSTER, et al.,	:	Case No.: 1:96 CV 1736
	:	
Plaintiffs	:	JUDGE SOLOMON OLIVER, JR.
	:	
v.	:	
	:	
JONATHAN W. MARSHALL, et al.,	:	
	:	
Defendants	:	ORDER (Sept. 25, 1996)

This Court earlier granted a preliminary injunction, as follows: "(1) the Court declares that Canon 7(C)(6) of the Ohio Code of Judicial Conduct is unconstitutional; and (2) defendants are hereby enjoined from enforcing Canon 7(C)(6) of the Ohio Code of Judicial Conduct." Order at 15 (Sept. 10, 1996). Canon 7(C)(6) places campaign spending limits of various amounts on different types of judges. For example, Canon 7(C)(6)(d) limits candidates for the court of common pleas to spending $75,000, while Canon 7(C)(6)(a) limits candidates for supreme court chief justice to spending $500,000.

Defendants have now moved for a "stay" of the preliminary injunction "to the extent it is overbroad." As explained below, given the nature of the relief requested, the Court construes this motion for stay as a motion for reconsideration and modification of its earlier order. As so construed, the motion is GRANTED IN PART. For the reasons outlined below, the Court's prior order is hereby MODIFIED NUNC PRO TUNC, so that the injunction contained at page 15 of the September 10, 1996 reads: "(1) the Court declares that

Canon 7(C)(6) of the Ohio Code of Judicial Conduct is unconstitutional; and (2) defendants are hereby enjoined from enforcing Canon 7(C)(6) of the Ohio Code of Judicial Conduct **against plaintiffs**." (Additional language is in bold typeface).

I.

Defendants present three related arguments for their position that the Court should modify and narrow its earlier Order granting preliminary injunctive relief. First, defendants present undisputed evidence that, shortly after this Court entered its September 10, 1996 Order granting a preliminary injunction, Judge Suster's opponent in the judicial race withdrew his candidacy. Defendants thus argue that a stay of the injunction should be granted because, with his opponent gone, Suster need not spend any more money at all to ensure his election.

Second, defendants note that an injunction should be "narrowly tailored to give *only the relief to which plaintiffs are entitled*," *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (emphasis added), and that "classwide relief . . . is appropriate only where there is a properly certified class." *Brown v. Trustees of Boston Univ.*, 891 F.2d 337, 361 (1st Cir. 1989), *cert. denied*, 496 U.S. 937 (1990). Defendants thus argue that even if injunctive relief is appropriate regarding enforcement of Canon 7(C)(6) against Judge Suster, it is inappropriate regarding enforcement against any other common pleas judge.

Finally, in the same vein, defendants argue that the injunction entered by this Court should be limted to enjoining enforcement of Canon 7(C)(6)(d), and not all of Canon 7(C)(6). Defendants note that plaintiffs in this case are candidates for judgeships in the Cuyahoga County Court of Common Pleas, and not for any Ohio Court of Appeals or the Ohio Supreme Court. Defendants thus insist the Court's earlier Order is

overbroad and should be limited to address only judicial races for courts of common pleas, governed by Canon 7(C)(6)(d), and not all state judicial races.

Regarding defendants' first argument, it may be true that Suster need not spend any more money to ensure his election. However, Suster may wish to spend more money on his campaign for other reasons, *e.g.*, to ensure the electorate believes he is qualified. opponent or no. If defendant's argument were correct, the State could prohibit campaign speech by all judicial candidates who are running unopposed, a result antithetical to core First Amendment principles. The limit contained in Canon 7(C)(6)(d) prevents Suster from engaging in political speech, and thus continues to threaten a violation of his First Amendment rights. Moreover, staying the preliminary injunction's protection of Suster against enforcement of Canon 7(C)(6) would be inconsistent with this Court's earlier determinations that: (1) irreparable harm would occur absent the stay; and (2) Suster has a great likelihood of succeeding on the merits of his case. Accordingly, the Court declines to stay or modify its prior Order by retracting its protection of Judge Suster.

Regarding the defendants' second and third arguments, the Court agrees that "it may not attempt to determine the rights of persons not before the court . . . [and] must, therefore, tailor the injunction to affect only those persons over which it has power." *Zepeda v. United States I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1983). This is especially true in the context of a preliminary injunction, which is not a final determination on the merits.

To ensure its prior Order is not applied overbroadly, the Court grants defendant's motion for reconsideration and modification. Accordingly, the Court's prior Order is hereby MODIFIED NUNC PRO TUNC, so that the injunction contained at page 15 of its September 10, 1996, Order reads:

"(1) the Court declares that Canon 7(C)(6) of the Ohio Code of Judicial Conduct is unconstitutional; and (2) defendants are hereby enjoined from enforcing Canon 7(C)(6) of the Ohio Code of Judicial Conduct **against plaintiffs**." (Additional language is in bold typeface).

The Court will issue an amended opinion, *in toto*, containing this modification *nunc pro tunc*.

IT IS SO ORDERED.

/s/
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RONALD SUSTER, et al.,	:	Case No.: 1:96 CV 1736
Plaintiffs	:	JUDGE SOLOMON OLIVER, JR.
v.	:	
JONATHAN W. MARSHALL, et al.,	:	
Defendants	:	ORDER (September 10, 1996)

Plaintiffs Ronald Suster and Patricia Cleary, both of whom currently serve as Judges on the Cuyahoga County Court of Common Pleas, bring this action against the following defendants: (1) Jonathan Marshall, Secretary of the Ohio Supreme Court Board of Commissioners on Grievances and Discipline ("Discipline Board"); (2) Robin Weaver, Chair of the Discipline Board; (3) David Evans, Vice Chair of the Discipline Board; and (4) all seven of the current Ohio Supreme Court Justices. Plaintiffs Suster and Cleary bring this action to challenge the constitutionality of provisions in the Ohio Code of Judicial Conduct that limit judicial campaign expenditures.

Currently pending is plaintiffs' motion for preliminary injunction (docket no. 3). On September 3, 1996, the Court heard oral argument regarding this motion. For the reasons stated below, the motion for preliminary injunction is GRANTED IN PART and DENIED IN PART. In particular, the Court enjoins enforcement of Canon 7(C)(6) of the Ohio Code of Judicial Conduct, which places a ceiling on the amount of funds a candidate may spend during a judicial race, finding

that Canon unconstitutional, but does not enjoin enforcement of Canon 7(C)(8), which prohibits a candidate in a judicial race from utilizing funds raised while running for non-judicial offices.

I. Findings of Fact.

None of the material facts in this case are in dispute. As noted, plaintiffs Ronald Suster and Patricia Cleary are both currently serving as Judges on the Cuyahoga County Court of Common Pleas. Judge Suster was appointed to this position in October of 1995; prior to that time, he served as an elected member of the Ohio House of Representatives. Judge Suster's term as Judge expires on December 31, 1996. Judge Cleary was elected to her position in 1994, and her term ends on December 31, 2000. Both plaintiffs are attorneys and registered voters in Cuyahoga County.

Suster is currently seeking to retain his position as Judge by running for election. Judge Suster won the primary election on March 19, 1996, and is now campaigning for the general election, to be held November 5, 1996. As an incumbent Judge and candidate for judicial office, he is subject to the Ohio Code of Judicial Conduct ("Judicial Code"). The Judicial Code is promulgated by the seven Ohio Supreme Court Justices named as defendants. Defendants Marshall, Weaver, and Evans have primary responsibility for initiating enforcement of the Judicial Code, through their initial review of all grievances relating to Judicial Code violations. Violations of the Judicial Code may lead to disciplinary sanctions, fines, and related punishment.

Canons 7(C)(6)(d)[1] and 7(C)(8) of this Judicial Code

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[1]Although the parties refer in their briefs to Cannon 7(C)(6)(a)(iv), they mean to cite Canon 7(C)(6)(d). Canon 7(C)(6)(a)(iv) was renumbered to be Canon 7(C)(6)(d) when

limit the amounts and sources of funds that a judicial candidate may spend during a judicial campaign. Specifically, Canon 7(C)(6)(d) states in relevant part that "[t]he total amount of expenditures made in the fund raising period . . . by the campaign committee of a judicial candidate shall not exceed . . . [s]eventy-five thousand dollars in the case of a judicial candidate for the court of common pleas." Canon 7(C)(8) states, *inter alia*, that "[a] judicial candidate shall not expend funds in a judicial campaign that have been contributed to him or her to promote his or her candidacy for a nonjudicial office."[2] Suster and Cleary challenge these provisions, seeking: (1) a declaratory judgment that the provisions violate their right to free speech, guaranteed by the First Amendment to the Constitution; (2) a

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the Canon was amended on February 20, 1996. This amendment, in turn, was brought about when plaintiff Suster challenged the Judicial Code's then-existing spending limits applicable to *primary* elections. *See Suster v. Board of Comm'rs on Grievances & Discipline of the Supreme Ct. of Ohio*, Case No. 96-CV-0235 (N.D. Ohio Feb. 20, 1996) (Gaughan, J.) ("*Suster I*"). *Suster I* was resolved when the defendants in that case signed a Final Consent Decree agreeing not to enforce Canons 7(C)(6)(b & c) (July 1, 1995), which, *inter alia*, had limited Suster's primary campaign spending to $18,750. The same day Judge Gaughan entered this Final Consent Decree in *Suster I*, the Ohio Supreme Court, over Justice Pfeiffer's dissent, amended Canon 7 to delete provisions 7(C)(6)(b & c) (July 1, 1995), which led to the renumbering.

[2]Canon 7(C)(8) goes on to state: "A judge or judicial candidate shall not contribute or expend campaign funds in support of or opposition to a candidate for a public office, other than the public office to which the judge or judicial candidate is seeking election." Defendants do not challenge this portion of Canon 7(C)(8).

declaratory judgment that the provisions violate their right to substantive due process; and (3) damages and attorney's fees, pursuant to 42 U.S.C. §§1983 and 1988.

In their role as judges, both Suster and Cleary challenge Canon 7(C)(6) as violative of their First Amendment rights. Suster has already spent about $73,000 during his primary campaign. Thus, under Canon 7(C)(6)(d), Suster may spend only about $2,000 more before he reaches his limit. Because Suster wants to spend more than an additional $2,000 pursuing his campaign during the general election, he challenges this provision. Cleary adds that she wants to spend more than a total of $75,000 when she runs for re-election in 2000, so she challenges this provision as well.

Also in his role as judge, Suster alone challenges Canon 7(C)(8) as violative of his First Amendment rights. Suster successfully ran for election as a state representative, he maintained a campaign committee called "Friends of Ron Suster." This committee managed a bank account into which it placed campaign contributions. Today, the committee's bank account still contains a positive cash balance of about $54,000. Suster would now like to spend some or all of this money on his present judicial campaign, but he is limited from doing so by Canon 7(C)(8). Thus, he challenges the limitation that he may not spend campaign funds raised during his past campaign for election as state representative on his present campaign for election as judge.

Finally, in their role as registered voters, Suster and Cleary challenge both Canons as violative of their First Amendment rights. Suster and Cleary note they are registered to vote in Cuyahoga County. In their role as potential voters--not as judicial candidates--Suster and Cleary complain that the challenged Cannons serve to abridge the total amount of campaign speech a judicial candidate may utter. Plaintiffs avow

that, as voters, they would like to consume as much political campaign speech as judicial candidates might wish to express. Thus, plaintiffs challenge both spending limits as violations of their right to hear political speech.[3]

II. Conclusions of Law.

This Court must consider and balance the following four factors in deciding whether to issue a preliminary injunction:

(1) whether the plaintiff has a substantial likelihood of success on the merits;

(2) whether the plaintiff will suffer irreparable injury if the relief is not granted;

(3) whether the order would cause substantial harm to others; and

(4) whether the public interest would be served by issuing the order of injunction.

Mason Cty. Med. Ass'n v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977). These four factors "do not establish a rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief." *Frisch's Restaurant, Inc. v. Shoney's, Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985). Rather, they are "factors to be balanced, not prerequisites that must be

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[3]Defendants suggested at oral argument that plaintiff Cleary may not have standing to pursue the claims advanced in the complaint. The Court does not address this issue because it is clear that plaintiff Suster, at least, does have standing to pursue all claims made.

met." *Id.* In this regard, no single factor is determinative. The Court must weigh and balance each of these factors in light of the factual circumstances of the particular case. *Columbia Gas Transmission Corp. v. An Exclusive Natural Gas Storage Easement*, 688 F.Supp. 1245, 1248 (N.D. Ohio 1988). A balancing of these four factors in this case demonstrates that plaintiffs are entitled to part, but not all, of the injunctive relief they seek.

A. Canon 7(C)(6).

1. Likelihood of Success on the Merits.

The legal analysis for any challenge to laws governing campaign finances must start with *Buckley v. Valeo*, 424 U.S. 1 (1976). In *Buckley*, the Supreme Court examined certain federal campaign expenditure ceilings and campaign contribution restrictions. The High Court determined that "[political campaign] contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities." *Id.* at 19. The Court stated that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* Because such restrictions "burden[] core political speech, [a court must] apply 'exacting scrutiny,' and . . . uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1519 (1995).

As of 1985, the only "legitimate and compelling government interests thus far identified for restricting campaign finances" by the Supreme Court were "preventing corruption or the appearance of corruption." *Federal Election Comm'n v.*

National Conservative Political Action Comm., 470 U.S. 480, 496-97 (1985) ("*NC-PAC*"). In 1990, the Supreme Court identified an additional interest, limiting "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1397 (1990). This latter compelling state interest is not implicated in this case.

The Supreme Court thus teaches that a statute may constitutionally restrict campaign finances to prevent corruption or the appearance of corruption, but the statute must do so in a narrowly tailored way. Moreover, a statute tending to infringe First Amendment freedoms must be so narrowly tailored that it infringes those freedoms by the least restrictive means possible. *Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983) ("[i]f the State has open to it a less drastic way of satisfying its legitimate interests, it may not choose a . . . scheme that broadly stifles the exercise of fundamental personal liberties"); *see also Brown v. Hartlage*, 456 U.S. 45, 53 (1982) (a "restriction [must] operate without unnecessarily circumscribing protected expression").

In its analysis of the compelling state interest of preventing corruption, the Supreme Court has noted that "[t]he hallmark of corruption is the financial quid pro quo: dollars for political favors." *NC-PAC*, 470 U.S. at 497. As such, limits on the amount of money an entity may contribute to a candidate's campaign may be, if narrowly tailored, constitutional. *E.g.*, *Buckley*, 424 U.S. at 29 (upholding limits on the amount of money a person can contribute to the campaign of a candidate for certain elected federal positions). The reason behind contribution limits is obvious--extremely large contributions may, or at least will appear to, buy political influence. Narrowly tailored limits on the size of campaign contributions, therefore, are constitutionally permitted to avoid corruption, even though

such limits may serve to reduce the total amount of money a candidate has available for disseminating his political speech.

Limits on campaign *contributions*, however, are qualitatively different from limits on campaign *expenditures*. There is a "fundamental constitutional difference between money spent to advertise one's views . . . and money contributed to the candidate to be spent on his campaign." *NC-PAC*, 470 U.S. at 497. A cap on the amount a candidate may spend in pursuit of elected office has little nexus to prevention of corruption or its appearance: unlike a campaign contributor, a candidate's dollars are traded not for possible political favors but for "political communications" through buying handbills, hiring halls for speeches and rallies, and purchasing advertising in broadcast and print media. *Buckley*, 424 U.S. at 19. Thus, not even the governmental interest of preventing corruption or the appearance of corruption will normally "justify the restriction on the quantity of political expression imposed by . . . campaign expenditure limitations." *Id.* at 55. As the Eighth Circuit noted recently, it is difficult "to discern how the interests of good government could possibly be served by campaign expenditure laws that necessarily have the effect of limiting the quantity of political speech in which candidates for public office are allowed to engage." *Shrink Missouri Government Political Action Comm. v. Maupin*, 71 F.3d 1422, 1426 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 2579 (1996) (noting also that although "the state's interest in reducing corruption . . . constitute[s] a compelling state interest, the state has failed to explain how the campaign spending limits . . . are narrowly tailored to serve this interest").

In the face of this overwhelming authority disfavoring the campaign spending limits contained in Canon 7(C)(6), defendants attempt to distinguish *Buckley*, *Shrink Missouri*, and other such cases by arguing that those cases addressed only campaign spending on *non-judicial* elections. Defendants argue

that "judicial election speech" is different from "legislative election speech," and that limiting the former through campaign spending limits is different from limiting the latter because of aspects unique to the position of judge.

In support of this notion, defendants quote case law stating that "[b]ecause the judicial office is different in key respects from other offices, the state may regulate its judges with the differences in mind." *Morial v. Judiciary Comm'n of State of Louisiana*, 565 F.2d 295, 302 (5th Cir. 1977) (en banc), *cert denied*, 435 U.S. 1013 (1978). As examples, defendants note that states may: forbid judicial candidates from identifying their party affiliation on the ballot, *Haffey v. Taft*, 803 F.Supp. 121, 125-26 (S.D. Ohio 1992); prohibit judges from publicly endorsing other candidates for public office, *In re Code of Judicial Conduct*, 603 So.2d 494, 498-99 (Fla. 1992); disallow judicial candidates from personally soliciting campaign contributions, *Stretton v. Disciplinary Bd. of Supreme Ct. of Pennsylvania*, 944 F.2d 137, 144 (3rd Cir. 1991); and ban judicial candidates from announcing their views on disputed legal or political issues likely to come before them as judges, *id.* at 146. Such restrictions on candidates for *non-judicial* office, of course, would almost certainly be unconstitutional. *See id.* at 142 (the state's "right to restrict the speech of its candidates for legislative and executive offices does not extend so far as to 'select which issues are worth discussing or debating' . . . in the course of the campaign") (quoting *Brown*, 456 U.S. at 45, 60) (some internal quotation marks omitted).

Although defendants construct an interesting argument, the Court does not find it persuasive. The cases cited by defendants are directed to regulations governing the permissible *content* of a judicial candidate's speech. Canon 7(C)(6) does not regulate content, but regulates the *quantity* of a judicial

candidate's speech.[4] Narrowly tailored regulation of the content of a judicial candidate's speech has been held constitutional because such regulations can serve to avoid the appearance of corruption. As an example, a judicial candidate's campaign promise always to rule in favor of employers in labor disputes is practically a solicitation of dollars from employers, in exchange for favorable rulings. Restrictions on campaign speech prohibiting a judicial candidate from announcing his views on "disputed legal or political issues . . . likely to come before the court" are permissible, therefore, to avoid this apparent and real quid pro quo corruption. *Stretton*, 944 F.2d at 144.

Defendants cite no case, and the Court cannot find one, standing for the proposition that regulations which, through campaign spending limits, restrict the *quantity* of speech a judicial candidate is otherwise allowed to express, are constitutional. The reason for this, as noted, is that there is virtually no link between campaign expenditure limits and the prevention of corruption. Regardless of whether a candidate is pursuing judicial, legislative, or executive office, any political favors he might owe correlate with the size of his campaign contributions, not the size of his expenditures. Because the Canon challenged here is directed entirely toward limiting the quantity of a judicial candidate's political speech, not its content, the cases cited by defendants are largely inapposite.

This is not to say defendants have failed to identify any important state interests that the challenged Canons might serve. One such interest identified by defendants is having "judges be judges, not campaign managers." It is fair to say that a state has a legitimate and strong interest in ensuring scarce judicial resources be directed as much as possible toward resolving

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[4]Compare Canon 7(B)(2)(b-f) of the Judicial Code, which regulates the content of a judicial candidate's speech.

disputes brought to its courts, not in election efforts. *See* Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 Harvard C.R-C.L. L. Rev. 187, 193-95 (1996) (demonstrating that judicial campaigns have become increasingly time-consuming and expensive, and citing the example that "[i]n 1986, two candidates for chief justice of the Supreme Court of Ohio spent in excess of $2,700,000, up from $100,000 six years earlier"). Defendants also assert the substantial state interest of ensuring the independence of the state judiciary and public confidence and trust in its elected judges. These are also strong and legitimate state interests, about which defendants are rightly concerned. In fact, defendants cite a poll of Ohio citizens, undertaken by the Citizen's Committee on Judicial Elections,[5] which reports that: (1) 90% of the citizenry believe judicial decisions are influenced by campaign contributions at least some of the time; and (2) these citizens believe limiting total campaign spending is the most effective way to alleviate this problem. This poll reveals that public confidence in its elected judiciary is sadly low, and the Court accepts that the State does have

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[5]The Citizen's Committee on Judicial Elections was established by the Ohio Supreme Court in 1994 to conduct a thorough review of Ohio's judicial election system. The Committee issued its report, known as the "McQuade Report" (named after the Committee Chairman, Judge Richard B. McQuade, Jr.), in January of 1995. The Committee suggested a number of reforms to the Judicial Code to increase the public's trust in its judiciary. Interestingly, however, the McQuade Report did *not* propose campaign expenditure limits, noting that "mandatory expenditure limits in non-judicial races have been determined to be unconstitutional." Report at 7. *see also* letter from Richard B. McQuade to Ohio Chief Justice Thomas Moyer (March 29, 1995) (stipulation exhibit 8) (explaining at length why the Citizen's Committee on Judicial Elections believed campaign spending limits were unconstitutional and bad policy).

substantial interest in securing public trust in the judiciary.[6] [7]

Even assuming these state interests are "compelling" and "overriding," however, defendants have failed to show that the restrictions placed upon a judicial candidate's campaign speech by Canon 7(C)(6) are "narrowly tailored" to serve these interests. *McIntyre*, 115 S. Ct. at 1519. As noted, the exacting scrutiny this Court must apply requires the Canon to serve the state's interests by the least restrictive means possible. *Anderson v. Celebreeze*, 460 U.S. 780, 806 (1983). In this case, it does not. Regarding the first state interest, the Canon does not ensure that "judges will be judges, not campaign managers." When judges are elected, not appointed, they are obliged to manage an election campaign. This is true regardless of how much they may be allowed to spend. Indeed, an argument may be made that judges will have to spend *more* time campaigning under a $75,000 campaign expenditure limit than under no limit--judges will be forced to make up for lack of wide-dispersion

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[6]Loss of the public trust in the elected judiciary, however, is not new. Ninety years ago, Roscoe Pound noted that "Putting courts into politics, and compelling judges to become politicians, in many jurisdictions has almost destroyed the traditional respect for the bench." *See* Note, *Merit Appointment Versus Popular Election: A Reformer's Guide to Judicial Selection Methods in Florida*, 43 Fla L. Rev. 529, 535 (1991) (citation omitted).

[7]Defendants cite a third state interest in support of the challenged provisions: to "level the playing field" between judicial candidates. The Supreme Court, however, has clearly stated that "leveling the playing field" is not a compelling state interest: campaign spending limits are not justified by a desire to "enhance the relative voice" of some candidates over others. *Buckley*, 424 U.S. at 48-49.

speech, via expensive television ads, by spending even more time making numerous speeches to smaller groups.

Further, defendants have not shown, and cannot show, that campaign expenditure limitations in and of themselves ensure the independence of the judiciary. The Supreme Court has stated clearly that while limiting campaign *contributions* may ensure the independence of elected candidates, by limiting the opportunity for "quid pro quo" political favors, limits on campaign *expenditures* do not have any direct nexus to this type of corruption. *Buckley*. 424 U.S. at 54-57; *see also Shrink Missouri*, 71 F.3d at 1426. Limiting the size of campaign contributions can ensure a judge is not beholden to a large contributor; limiting the candidate's expenditures does not have this effect. Thus, the limit on total campaign expenditures imposed by Canon 7(C)(6) is simply not narrowly tailored to achieve the state interest of ensuring the independence of the judiciary.

Finally, the defendants have not shown Canon 7(C)(6) is narrowly tailored to improve the public's confidence and trust in its elected judges. To the contrary, the Canon is not tailored toward serving this interest at all--the spending limits as promulgated apply to judicial candidates extremely unequally. For example, a candidate for judge in the court of common pleas in Cuyahoga County, which has a population of over 900,000 registered voters, is limited to spending 8.3 cents per voter; a candidate in Vinton County, which has about 7,500 registered voters, is limited to spending $10 per voter.[8] Presumably, a

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[8]Defendants' counsel graphically illustrated this difference at oral argument by noting that the Cuyahoga County candidate could not send a postcard to each voter, while the Vinton County candidate could buy each voter a (tough) steak dinner.

voter could thus trust a candidate from Cuyahoga County more than one from Vinton County. This is not "narrow tailoring." Moreover, in summarizing the results of the citizens poll, the accompanying report notes that "spending limits can provide an undue advantage to incumbents and candidates with well-known names." McQuade Report at 7. As such, campaign spending limits carry their own problems and may not improve the public's trust in its judges at all. Finally, it appears there are available more narrowly tailored methods of improving the public's confidence that elected judges will not favor campaign contributors, not the least of which include enforcing and publicizing existing rules regarding contribution limits,[9] or mandating a judge's recusal if a party or attorney has made campaign contributions of a certain size.[10]

In the end, overwhelming and recent case law shows that rules limiting the total amount of judicial campaign expenditures, as does Canon 7(C)(6), are unconstitutional as a violation of the right to free speech.[11] *E.g., Shrink Missouri*, 71 F.3d at 1426 (no compelling state interests are "served by

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[9]For example, a non-family individual may not contribute more than $250 to the campaign of a judicial candidate for county court. Canon 7(C)(5)(a)(i).

[10]Current rules regarding recusal are contained in Canon 3(C, D).

[11]Academic articles add that rules limiting the total amount of judicial campaign expenditures are probably ineffective, as well. *See* Roy A Schotland, *Elective Judges' Campaign Financing: Are State Judges' Robes the Emperor's Clothes of American Democracy?*, 2 J. of Law & Politics 57, 121-22 (1985) (reciting numerous reasons campaign spending caps do not work).

campaign expenditure laws that necessarily have the effect of limiting the quantity of political speech in which candidates for public office are allowed to engage"). Canon 7(C)(6) does not withstanding the "exacting scrutiny" required to pass constitutional muster. As to this Canon, therefore, plaintiffs have a very high likelihood of success on the merits.

2. Other Factors.

There is little question that a violation of plaintiffs' right to free speech is an irreparable injury. "The loss of First Amendment freedoms, for even minimal period of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *see also Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief").

Also, there appears to be no substantial harm that would come to others if the injunction is granted. Defendants have identified no one whom an injunction would injure. There would certainly be no injury to plaintiffs' election opponents, an injunction declaring unconstitutional, and prohibiting enforcement of, a campaign expenditure cap would affect all judicial candidates equally.

Finally, the public interest would certainly be served by issuing an order enjoining enforcement of a rule that serves to limit "core political speech." *McIntyre*, 115 S. Ct. at 1519. There is no public interest in enforcing a law that "curtail[s] debate and discussion" regarding issues of political import. *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, Cal.*, 454 U.S. 290, 299 (1981).

Because all of the four factors the Court must consider and balance in deciding whether to issue a preliminary injunction

regarding Canon 7(C)(6) weigh in favor of plaintiffs, the preliminary injunction is GRANTED, as follows: (1) the Court declares that Canon 7(C)(6) of the Ohio Code of Judicial Conduct is unconstitutional; and (2) defendants are hereby enjoined from enforcing Canon 7(C)(6) of the Ohio Code of Judicial Conduct.

B. Canon 7(C)(8).

1. Likelihood of Success on the Merits.

Sentence one of Canon 7(C)(8) prohibits a judicial candidate from spending funds on a campaign for judicial office if those funds were raised while campaigning for a non-judicial office. Such a shifting of funds raised during one campaign to support another campaign is generically known as "intra-candidate transfers." *Service Employees Int'l Union v. Fair Political Practices Comm'n*, 955 F.2d 1312, 1315 (9th Cir. 1992), *cert. denied*, 505 U.S. 1230 (1992). It is clear that a ban on such transfers works to limit political speech: if plaintiff Suster could use, during his present judicial campaign, the $54,000 he raised while campaigning for election to the state legislature, he could give voice to more "political communication" through buying postage for campaign literature, hiring halls for rallies, and purchasing advertising. *Buckley*, 424 U.E. at 19; *Service Employees*, 955 F.2d at 1322. As with Canon 7(C)(6), then, Canon 7(C)(8) infringes upon plaintiffs' First Amendment rights by limiting total campaign expenditures. Accordingly, Canon 7(C)(8) must be declared unconstitutional unless "it is narrowly tailored to serve an overriding state interest." *McIntyre*, 115 S. Ct. at 1519.

In support of their position that Canon 7(C)(8) is not narrowly tailored, and thus that they are likely to win on the merits, plaintiffs cite *Service Employees* and *Shrink Missouri*.

Both of these cases involved challenges to, *inter alia*, provisions prohibiting intra-candidate transfers.[12] In both cases, the elected officials whom the statutes prohibited from engaging in intra-candidate transfers included judges.[13] And in both cases, the

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[12]The statute at issue in *Service Employees* prohibited "transfer of funds between controlled committees of a single candidate." *Service Employees*, 955 F.2d at 1315. The statute at issue in *Shrink Missouri* prohibited a candidate from "carry-over from one campaign to the next of any but very small amounts of funds," by mandating that money raised but not spent during a campaign be returned to contributors or forfeited to the state ethics commission. *Shrink Missouri*, 892 F. Supp. at 591; *Shrink Missouri*, 71 F.3d at 1427.

[13]Contrary to defendants' suggestion at oral argument, the Missouri statute challenged in *Shrink Missouri* applied to all elected officials, including judges. Missouri amended its State Constitution in 1976 to provide that Justices and Judges are *initially* appointed to the state Supreme Court and certain lower courts. These judges must run for re-election, however, and other judges are popularly elected both initially and thereafter. Office of the Secretary of State of the State of Missouri, *Official Manual: State of Missouri 1995-1996* 192 (1995) (Steven N. Ahrens, ed.); *see also* 30 The Council of State Governments, *The Book of the States*, 190-92 (1994-95) (the fifty States either (1) popularly elect their judges, (2) select judges by legislative or executive appointment, or (3) use a hybrid approach; Missouri uses the third method). The ruling in *Shrink Missouri*, therefore, applied to judicial *and* non-judicial elections. The California statute challenged in *Service Employees* also applied to all elected officials, including judges. *See* Cal. Govt. Code §82023 ("Effective office' means any state, regional, county, municipal, district *or judicial office* which is filled at an election") (emphasis added).

courts struck down the statutes prohibiting transfers, holding the statutes were unconstitutional. Specifically, the *Service Employees* court ruled:

> It is clear that the ban acts as an expenditure limitation; such limitations have never been upheld, save in connection with the expenditures of corporations [referring to *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990)]. Moreover, the sole justification offered for the [intra-candidate] transfer ban, is a notion that contributions given for one office ought not be diverted to another, because the donation was solicited and given with a particular office in mind. This "trust" theory, which suggests donations are premised upon the office rather than the candidate, may, of course, sometimes be true; on the other hand, as evidence in this trial demonstrated, it is sometimes false. More to the point, it is clear that to the extent the provision is intended to insure truth in soliciting, a narrower and more efficacious means is readily at hand. Such a purpose is easily served by requiring that the candidate inform potential donors of his intentions, or if he is unable to do so, to acknowledge that the sums raised could be expended on other races.

Service Employees, 747 F. Supp. at 580; *see also Service Employees*, 955 F.2d at 1322 (agreeing with the district court's analysis).

Similarly, the *Shrink Missouri* court held:

> The [laws banning intra-candidate transfers] clearly limit political speech by telling

> a candidate *when* he or she must speak, that is, by stating that the money must be spent in the particular campaign in which it was raised. Defendants assume that contributors always wish to contribute to a candidate for a particular campaign, and that a general contribution to a candidate, which that candidate could use for current or future campaigns, must constitute an impermissible attempt at improper *quid pro quo* influence. The Court disagrees, and thinks it is entirely legitimate for a contributor to give money to a candidate because the contributor supports that candidate, in whatever race the candidate may later choose to run. This type of "blind support" does not necessarily imply that the contributor expects favors, but rather that the contributor supports the candidate because of the candidate's particular views or politics--the very essence of protected political speech. The dangers of *quid pro quo* corruption are adequately addressed by the overall contribution limits [contained in the statute].

Shrink Missouri, 892 F. Supp. at 1254 (emphasis in original); *see also Shrink Missouri*, 71 F.3d at 1427-28 (agreeing with the district court and noting that the statute was not narrowly tailored).

Service Employees and *Shrink Missouri* do lend support to plaintiffs' position. This Court finds both cases distinguishable, however, because neither case focused on the peculiarities of the elected position of judge. In neither case

were any of the litigants judicial candidates.[14] Thus, in neither case did the parties argue, nor did the courts consider, the more particular compelling state interest of avoiding corruption or the appearance of corruption *of elected judges*. Both the *Service Employees* and *Shrink Missouri* courts heard arguments from candidates to *non-judicial* elected office, and ruled that provisions limiting intra-candidate transfers were unconstitutional as applied to *all* elected offices. Given that plaintiffs in this case are judges, the Court has been presented with meaningfully different arguments.

Specifically, the defendants offer the compelling state interest that prohibition of intra-candidate transfers ensures judicial candidates do not violate other Canons of the Judicial Code, which govern judicial campaigning. As example, defendants note that other provisions of the Judicial Code restrict a judicial candidate's speech in the following ways: (1) limiting to $250 the amount an individual, other than a family member, may contribute to a candidate's campaign for judge on a court of common pleas, Canon 7(C)(5)(a)(i); (2) prohibiting candidates from promising how they will rule on matters that may come before them, or even expressing views on such matters, Canon 7(B)(2)(c-e); and (3) prohibiting candidates from soliciting campaign funds personally, Canon 7(C)(2)(a).

Defendants then correctly note that Canon 7(C)(8), which bans intra-candidate transfers, helps to ensure judicial

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[14]In *Service Employees*, plaintiffs included "a number of elected state officials, various campaign committees, labor organizations, and a contributor to political campaigns," as well as intervenor plaintiff the Democratic Party, 747 F. Supp. at 581. In *Shrink Missouri*, plaintiffs included two candidates who had run for legislative office and also a political action committee, 892 F. Supp. at 1248.

candidates will not avoid the restrictions contained in these other Canons. For example, a person who runs for state *legislative* office (as has plaintiff Suster) may legally: (1) endorse the death penalty for all felons who deal drugs, or alternatively endorse commutation of all current death penalty sentences to life in prison; (2) write personal letters soliciting campaign funds based on his death penalty views; and (3) accept two $2,500 campaign contributions from an individual who responds favorably to his letter.[15] The Judicial Code prohibits a candidate for *judicial* office from doing any of these things. Defendants thus argue that Canon 7(C)(8) serves the compelling state interests of: (1) ensuring the integrity of the judiciary; and also (2) ensuring fairness between judicial candidates by preventing all candidates, equally, from using contributions gained through forbidden judicial campaign speech. While not suggesting the plaintiffs in this case have done so, defendants add that a judicial candidate might even purposely amass a "war chest" during a campaign for non-judicial office (using tactics disallowed by the Judicial Code), all the while *planning* to use these funds for a later judicial campaign.

As an initial matter, the Judicial Code's prohibitions of a candidate's personal solicitation of campaign contributions, and expression of views on matters that may come before them, appear constitutional. *Stretton v. Disciplinary Bd. of Supreme Ct. of Pennsylvania*, 944 F.2d 137 (3rd Cir. 1991). In *Stretton*, a judicial candidate "sought an injunction against enforcement of Canon 7 of the [Pennsylvania Code of Judicial Conduct], which bars candidates from announcing their views on disputed

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[15]A candidate for the state legislature may accept a $2,500 contribution from an individual during the campaign for primary election, and another $2,500 contribution from the same individual during the campaign for general election. Ohio Rev. Code §3517.102(B)(1)(a-c).

legal or political issues and also prohibits personal solicitation of campaign funds." *Id.* at 139. The court, however, denied the request for injunctive relief. First, the *Stretton* court noted that "a state has a compelling interest in the integrity of its judiciary." *Id.* at 142; *Morial v. Judiciary Comm'n of State of Louisiana*, 565 F.2d. 295, 302 (5th Cir. 1977) (en banc), *cert denied*, 435 U.S. 1013 (1978) ("[t]he state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect"). The court then found that the provision limiting the content of a judicial candidate's speech "serves that end," *Stretton*, 944 F.2d. at 142, because "[t]he public has a right to expect that a court will make an assessment of the facts based on the evidence submitted in each case, and that the law will be applied regardless of the personal views of the judge. Taking a position in advance of litigation would inhibit the judge's ability to consider the matter impartially." *Id.* at 144.

The *Stretton* court also upheld the prohibition of personal solicitation of campaign funds, noting that "[t]he stake of the public in a judiciary that is both honest in fact and honest in appearance is profound... . A judge's direct request for campaign contributions offers a *quid pro quo* or, at least, can be perceived by the public to do so. Insulating the judge from such direct solicitation eliminates the appearance (at least) of impropriety and, to that extent, preserves the judiciary's reputation for integrity." *Id.* at 145 (quoting *In re Fadely*, 802 P.2d. 31, 40 (Or. 1990)).

As in *Stretton*, Canons 7(B)(2)(c-e) and 7(C)(2)(a) of the Ohio Judicial Code prohibit judicial candidates from personal solicitation of campaign funds and from announcing their views on disputed legal or political issues that may come before them. These Canons appear to be constitutional, and plaintiffs do not challenge them here. The provisions are designed to ensure the actual and apparent impartiality of the

judiciary, and to avoid the actual or apparent quid pro quo corruption of judges.

Canon 7(C)(8) is designed to serve these same compelling state interests. The Canon prevents a judicial candidate from using, in a judicial campaign, money that was likely raised through personal solicitation and/or in response to a candidate's views on disputed legal or political issues. Returning to the example mentioned above, Canon 7(C)(8) ensures a judicial candidate may not spend money campaigning for a judgeship if the money was raised through a personal solicitation letter advocating execution of drug felons or commutation of all death penalty sentences. This is entirely legitimate as a way to prohibit quid pro quo judicial rulings. Moreover, Canon 7(C)(8) serves to ensure all judicial candidates are protected equally: no judicial candidate, regardless of the nature of his prior campaigns for elected office, may use funds collected during a non-judicial campaign.

Not only does Canon 7(C)(8) serve a compelling state interest, it is narrowly tailored to further it. The Canon does not restrict a candidate for legislative or executive office from using funds raised in a previous legislative or executive, or even judicial, campaign. Nor does the Canon disallow a candidate for judicial office from using funds raised in a previous judicial campaign. Thus, despite Canon 7(C)(8), plaintiff Suster may: (1) use the funds maintained by the "Friends of Ron Suster" committee to campaign for legislative or executive office; (2) use funds raised during his present judicial campaign for a subsequent judicial campaign; and (3) even use funds raised during his present judicial campaign for a subsequent legislative or executive campaign. Canon 7(C)(8) only disallows Suster from campaigning for judicial office with funds raised during a previous campaign for legislative or executive office. And, of course, Canon 7(C)(8) leaves available to Suster campaign fund sources other than the "Friends of Ron Suster" bank account.

In sum, the Court finds *Service Employees* and *Shrink Missouri* distinguishable, and further finds that plaintiffs are not likely to succeed on the merits of their argument that Canon 7(C)(8) is unconstitutional. The ban contained in that Canon, prohibiting intra-candidate transfers of campaign funds to judicial candidates, is narrowly tailored to serve the compelling state interest of ensuring that judges be and appear to be impartial, and the related interest of avoiding actual and apparent judicial corruption. Because Canon 7(C)(8) survives this exacting scrutiny, plaintiffs are not likely to succeed on the merits.

2. Other Factors.

As noted above in the context of discussing Canon 7(C)(6), "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). To some extent, then, the second factor weighs in favor of plaintiffs, because their First Amendment rights are infringed by Canon 7(C)(8). This infringement, however, is no more than is necessary to further compelling state interests. The Court also notes that plaintiffs' injury is tempered somewhat in that the barriers limiting their opportunity to engage in unlimited political speech are greatly relieved by the Court's granting of the injunction relative to Canon 7(C)(6); Suster may spend more than $75,000 pursuing his campaign, but he must use funds other than those in the "Friends of Ron Suster" bank account.

Regarding the third factor, there does appear to be a substantial harm that would come to others if the injunction regarding Canon 7(C)(8) is granted. Judicial candidates who do not have access to a "war chest" compiled during campaigns for non-judicial offices would be at a severe disadvantage if those who do have such war chests, gained through tactics disallowed by the Judicial Code, could use them. Granting the requested

injunction would allow some judicial candidates to enjoy benefits others cannot obtain. This factor weighs against granting the injunction; denying the injunction protects all judicial candidates equally.

Finally, the public interest factor weighs most heavily for defendants. As noted, "[t]he state's interest in ensuring that judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect." *Morial*, 565 F.2d. at 302. Canon 7(C)(8) helps to serve this interest, while limiting a judicial candidate's speech only so much as is necessary.

Weighing all four factors together, the Court concludes that the circumstances preponderate in favor of defendants, and a preliminary injunction enjoining enforcement of Canon 7(C)(8) is not appropriate in this case. Accordingly, the preliminary injunction is DENIED, as follows: (1) the Court declares that sentence one of Canon 7(C)(8) of the Ohio Code of Judicial Conduct is not unconstitutional; and (2) defendants may continue to enforce Canon 7(C)(8) of the Ohio Code of Judicial Conduct.

IT IS SO ORDERED.

/s/

UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 8 1998
CLERK

No. 98-737

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JONATHAN W. MARSHALL, *et al.*,

Petitioners,

vs.

RONALD SUSTER, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS RONALD SUSTER & PATRICIA CLEARY

TIMOTHY J. GRENDELL
Counsel of Record
JOHN W. MONROE
GRENDELL & TARGOVE, L.L.P.
Attorneys for Respondents
Ronald Suster and Patricia Cleary
6060 Rockside Woods Boulevard
Suite 250
Independence, Ohio 44131
(216) 524-6444

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Sixth Circuit correctly reviewed the law as it existed at the time the lawsuit was filed.

II. Whether the Sixth Circuit correctly held that the District Court did not abuse its discretion in granting Respondents a preliminary injunction enjoining the judicial campaign spending limits imposed by the former Cannon VII of the Code of Judicial Conduct of the Ohio Supreme Court on the basis of this Court's ruling in *Buckley v. Valeo* which prohibits quantitative limits on political speech.

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STATEMENT OF JURISDICTION

Respondents do not dispute this Court's jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The Ohio State Bar Association, in its Amicus Brief in the Sixth Circuit Court of Appeals filed in support of the Respondents, cogently set forth the rationale for striking down judicial campaign spending limits as unconstitutional:

> If we are to continue to elect judges in Ohio, then a truly informed electorate is critical to maintaining public confidence in the judiciary.

OSBA Sixth Circuit Court of Appeals Brief, pp. 2-3. In order for a candidate to inform an electorate, money is required: money to mail flyers to voters, money for television and radio advertisements, money to print campaign literature.

Spending limits on judicial campaigns affect a candidate's ability to speak to voters. They limit the *quantity* of political speech. Such quantitative limits on political speech are unconstitutional. This is the simple holding of *Buckley v. Valeo*, 424 U.S. 1 (1976). An analogy suggested by this Court in *Buckley*, 424 U.S. 1 at n.18, tersely explains why spending limits *fail* to pass constitutional muster:

> Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline.

The simplicity of this analysis was *not* lost on the District Court, it was *not* lost on the Sixth Circuit Court of Appeals; however, it certainly is lost on the Petitioners.

In order to justify their currently politically popular view that spending limits do not fall within the ambit of *Buckley*, the Petitioners must convince this Court that a person who runs for judge and speaks to voters about his or her qualifications for office somehow is *not* engaging in a political act worthy of First Amendment protection. The District Court in granting Appellees' a preliminary injunction did not buy this argument, the Sixth Circuit Court of Appeals did not by this argument and neither should this Court.

Respondent Ronald Suster is an attorney at law licensed to practice before all courts in the State of Ohio and is presently serving a term as Judge on the Cuyahoga County Court of Common Pleas, which term ends in January 2002. Prior to being appointed to the judiciary in October, 1995, Suster served from 1981 to 1995 as an elected member of the Ohio House of Representatives from Cuyahoga County. Suster won the primary election on March 19, 1996 and stood for election for judge of the Cuyahoga County Court of Common Pleas in the general election held November 5, 1996.

Respondent Patricia Cleary is an attorney at law licensed to practice before all courts in the State of Ohio and is presently serving as Judge on the Cuyahoga County Court of Common Pleas, which term ends December 31, 2000. She is also a registered voter in Cuyahoga County and she, like Appellee Suster, wished to receive information about judicial candidates running for the common pleas bench in Cuyahoga County.

Petitioner Jonathan W. Marshall ("Marshall") is the Secretary of the Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court ("Board") and is responsible for conducting a preliminary review of all grievances alleging violations of Canon VII of the Code of Judicial Conduct. If Marshall determines: (1) the grievance is

facially valid, (2) the Board has jurisdiction over the grievance, and (3) there is probable cause that a violation of Canon VII has occurred, then Marshall prepares a complaint and disciplinary sanction, an order of contempt of court, fines, and/or assessments of costs.[1]

Petitioners Thomas J. Moyer, Andrew Douglas, Alice Robie Resnick, Francis E. Sweeney, Paul E. Pfeifer, Deborah L. Cook and Evelyn L. Stratton are justices of the Ohio Supreme Court. The Supreme Court enacted, and its agencies enforce, Canon VII of the Code of Judicial Conduct. The Supreme Court itself may enforce Canon VII regarding violations committed in its presence.

In 1992, the Board created a subcommittee, chaired by Judge Harry White of Belmont County, to conduct a comprehensive review of the Code of Judicial Conduct. Among other things, the White Committee reviewed Canon VII of the Code of Judicial Conduct relating to judicial campaign conduct and campaign finance. In 1993, the Ohio State Bar Association ("OSBA") established an Ad Hoc Committee to Review Supreme Court Campaign Finances. In September, 1993, the White and OSBA Committees delivered their reports to the Supreme Court.

In September, 1993, Chief Justice Moyer announced that the White and OSBA Committee Reports would be submitted

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1. Petitioner Robin G. Weaver ("Weaver") is the current Chair of the Board. If Marshall has a conflict of interest or is unavailable, Marshall is required to forward the grievance relating to violations of Canon VII to Weaver who shall conduct the preliminary review. Petitioner David T. Evans ("Evans") is the current Vice Chair of the Board. If Marshall and Weaver have a conflict of interest or are unavailable, Weaver is required to forward the grievance relating to a violation of Canon VII to Evans who shall conduct the preliminary review.

to a special committee of the Supreme Court chaired by Judge Richard McQuade and given a comprehensive review. The McQuade Committee was established by Chief Justice Moyer in May, 1994, and charged to conduct a top-to-bottom review of Ohio's judicial election system.

In January, 1995, the McQuade Committee issued its Report to the Ohio Supreme Court. The Committee did *not* recommend any campaign spending limits. Indeed, the Committee expressly voiced *its opposition* to any judicial campaign *spending* limits:

> Some citizens frequently cite "just put a lid on it" as the solution to the problem of money in campaigns. Although a cap on spending might seem to be the simplest approach to reducing the large amount of money spent on campaigns, mandatory expenditure limits in non-judicial races have been determined to be unconstitutional. In addition, *spending limits can provide an undue advantage to incumbents and candidates with well-known names.*

McQuade Report at p. 7 (emphasis added).

On April 10, 1995, the Supreme Court enacted certain changes to the Code of Judicial Conduct. Effective on July 1, 1995, Canon VII of the Ohio Code of Judicial Conduct ("Canon VII") was amended to limit campaign expenditures by candidates for the judge of a court of common pleas to $75,000 of which $18,750 could be used by the candidate in a primary election. In addition, Canon VII was amended to add a provision prohibiting a judicial candidate from spending money which had been contributed to promote a candidate's non-judicial campaign.

On February 5, 1996, Respondent Suster brought suit in the United States District Court for the Northern District of Ohio in a case styled *Suster v. Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court, et al.*, Case No. 1:96CV-0235, challenging the constitutionality of the primary campaign spending limits for common pleas candidates contained in Canon VII. Thereafter, the Ohio Supreme Court decided to amend Canon VII to remove limits on campaign spending for primary elections, but to leave intact that portion of the Canon limiting overall spending for a judicial campaign. The Supreme Court so advised the litigants and the Court on or about February 15, 1996. On February 20, 1996 the United States District Court for the Northern District of Ohio, without hearing evidence or argument and without making conclusions of law, entered a Final Consent Decree permanently enjoining the Defendants from enforcing the primary campaign spending limits. Thereafter, the Ohio Supreme Court amended Canon VII to remove the primary campaign spending limits for all judicial candidates

Prior to the March 19, 1996, primary election, Suster's judicial campaign committee spent $72,710.01 to communicate Suster's qualifications, experience and other information to the voters of Cuyahoga County. Suster was the victor in the March 19, 1996 primary election and for a period of time faced a challenge in the November, 1996 general election until early September 1996 when his challenger withdrew

Suster wanted to spend more than $75,000 before the general election scheduled for November 5, 1996 to effectively communicate his qualifications and aspirations for serving the people of Cuyahoga County as a common pleas court judge because:

(a) he believes he does not have name recognition as a judicial candidate among the voters of Cuyahoga County;

(b) his Committee having nearly reached the $75,000 general election spending limit, was restricted to the *de minimis* dissemination of information to the electorate in Cuyahoga County; and

(c) he believes the general spending limit provides for an insufficient amount of funds to allow him to disseminate his message to the more than 850,000 registered voters in Cuyahoga County.

Suster was prepared to spend in excess of $75,000 on his judicial campaign.

REASONS FOR DENYING THE WRIT

Ohio citizens deserve the opportunity to hear whatever quantity of speech is desired by a particular candidate in their effort to inform the electorate. It is only through a campaign of free speech, unrestricted in quantity, that a voter may truly vote thoughtfully, intelligently, and with confidence for an effective judiciary. Restrictions which suppress the *quantity* of speech a judicial candidate can disseminate will only serve to reinforce the public's misperception of the Ohio judiciary.

Restrictions on the quantity of speech made by judicial candidates should be analyzed in the same manner as restrictions on the quantity of speech for candidates to other offices. Whether a person is running for judge or dogcatcher, the Constitution protects the *quantity* of *all* political speech. It is

under this analysis that the District Court correctly determined the expenditure limits of Canon VII(C)(6)(d) should be enjoined.

Buckley v. Valeo, 424 U.S. 1 (1976), clearly addresses Canon VII's campaign spending limitations. Under *Buckley*, campaign expenditure limits contained in the Federal Election Campaign Act were found to "necessarily reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. Despite Petitioners' suggestions that Buckley does not apply to judicial campaign expenditures, they make no coherent, or supported, arguments that *Buckley* should not apply to the *quantity* of protected political speech uttered by judicial candidates. The District Court applied the correct standard of review, the same standard of review applied in *Buckley* as well as other decisions, in determining the constitutionality of Canon VII(C)(6) and (8). Simply stated, an infringement upon free speech must be narrowly tailored to serve a compelling interest. *Buckley*, 424 U.S at 45. The infringement caused by Ohio's Canon VII(C)(6) and (8) are not narrowly tailored.

I.

THE SIXTH CIRCUIT CORRECTLY REVIEWED THE LAW AS IT EXISTED AT THE TIME THE LAWSUIT WAS FILED AND DECIDED.

Contrary to Petitioners' arguments, the Sixth Circuit Court of Appeals did *not* err when it properly reviewed the questions before it — did the District Court abuse its discretion when it enjoined Petitioners from enforcing former Canon VII(C)(6)(a) which was the law when the suit was filed and decided.

The Sixth Circuit Court of Appeals properly held that the question of whether the district court abused its discretion in granting the preliminary injunction was still ripe. The Court found that if it were to determine that the district court erred in issuing the preliminary injunction, then the legal interests and positions of Respondents would be compromised as they have received no assurances that grievances will not be pursued and penalties not imposed under the old Canon. *See Edgar v. Mite Corp.*, 457 U.S. 624, 647-54, 102 S. Ct. 2629, 2643-47, 73 L. Ed. 2d 269 (1982) (Stevens, J., concurring); *McPherson v. Michigan High School Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) ("The test for mootness 'is whether the relief sought would, if granted, make a difference to the legal interest of the parties.' ") (Citation omitted). Hence, the appellate court's review of the district court's grant and denial of preliminary injunction could *not* be said to be moot.

The Circuit Court properly concluded that as to the substantive challenge to the constitutional merits of Canon VII(C)(6) and Canon VII(C)(8), it could no longer consider the former version of Canon VII(C)(6) as it has recently been amended citing *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414, 92 S. Ct. 574, 575, 30 L. Ed. 2d 567 (1972). However, the appellate court held that because such expenditure limitations for judicial candidates continues to remain in the revised Canon, there was still a case and controversy between the parties the Circuit Court cited this Court, when it found where a new Canon "is sufficiently similar to the [amended Canon] it is permissible to say that the challenged conduct continues," the controversy is not mooted by the change, and a federal court continues to have jurisdiction. *Northeastern Fla. Chapter v. City of Jacksonville*, 508 U.S. 656, 662 n.3, 113 S. Ct. 2297, 2301 n.3, 124 L. Ed. 2d 586 (1993). Hence, the Sixth Circuit Court of Appeals correctly concluded there was jurisdiction over the revised Canon VII(C)(6), as well as Canon VII(C)(8).

The Sixth Circuit went on to hold that the fact that the Canon has been revised is of no import to its decision to refrain from reviewing the amended Canon because, it found where a change in law does not extinguish the controversy, the preferred procedure is for the court of appeals to remand the case to the district court for reconsideration of the case under the amended law. *See Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646, 650 (5th Cir. 1978); *Korn v. Franchard Corp.*, 456 F.2d 1206, 1208 (2d Cir. 1972).

The Appellate Court properly concluded that as the district court never had the opportunity to fully address the merits of Respondents' challenge prior to the amendment during the appeal, nor did it have the opportunity to fully consider the constitutionality of the amended Canon, it would refrain from considering the merits of amended Canon VII(C)(6); limit its view to the consideration of the appropriateness of preliminary injunction under the old Canon VII(C)(6) and Canon VII(C)(8); and remand amended Canon VII(C)(6) to the District Court for a full review.

This decision was well grounded in law and the record. Accordingly, this Honorable Court should decline to revisit the issue at this point in the federal judicial process.

II.

THE COURT OF APPEALS AND DISTRICT COURT CORRECTLY HELD THAT THE OHIO SUPREME COURT'S JUDICIAL CAMPAIGN SPENDING LIMITS LACKED THE REQUISITE COMPELLING INTEREST FOR AN INFRINGEMENT ON FIRST AMENDMENT RIGHTS.

When determining whether an act unconstitutionally burdens speech, there is a single test, a test which Petitioners cite, but also disregard:

> When considering whether a campaign finance law unconstitutionally infringes freedom of speech, this Court's task is to decide whether the provision in question actually burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest.

Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 657, 110 S. Ct. 1391, 1396, 108 L. Ed. 2d 652 (1990) (citing *Buckley* [*v. Valeo*], 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659). The District Court and Sixth Circuit Court of Appeals correctly followed this test by holding that the judicial spending limits burdened political speech, do not serve a compelling state interest, and were not narrowly tailored.

A. The Judicial Campaign Spending Limits Do Not Address a Compelling State Interest.

This Court has set forth only two interests which can justify a reduction in political speech: preventing corruption or the appearance of corruption.

In *FEC v. NCPAC*, 470 U.S. 480, 496-497 (1985), this Court ruled:

> We held in Buckley and reaffirmed in Citizens Against Rent Control that *preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.* In Buckley we struck down the FECA's limitation on individuals' independent expenditures because we found no tendency in such expenditures, uncoordinated with the candidate or his campaign, to corrupt or to give the appearance of corruption.
>
> * * *
>
> Corruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors. But here the conduct proscribed is not contributions To the candidate, but *independent expenditures in support of the candidate. . . . The Court concluded Buckley that there was a fundamental constitutional difference between money spent to advertise one's views independently of the candidate's campaign and money contributed to the candidate to be spent on his campaign.*

(Emphasis added.) This Court has yet to identify any other compelling state interests permitting core political speech to be burdened. Petitioners do not cite *any* Supreme Court or Sixth Circuit cases which expand the list of compelling state interests that jusitfy the regulation of political speech.

None of the state interests indentified in Petitioners' Writ are associated with addressing corruption or the appearance of corruption.

First, Petitioners assert that campaign speech by judicial candidates is at odds with preserving judicial independence and ensuring public trust and confidence in the courts. This has nothing to do with preventing corruption or the appearance of corruption. Petitioners do not assert that there is a correlation between public confidence in the judicial system and allowing a judicial candidate the opportunity simply to express his or her qualifications, background and expertise for the bench. Indeed, it should have just the opposite effect as citizens elect to the bench people they know are qualified.

This Court can, should, and does encourage respect for the judiciary and judicial system, but it may not limit speech to achieve such goals. It is *not* a proper governmental function to instill confidence in public institutions through the regulation of speech. This Court's flag burning cases make this precise point. In *Texas v. Johnson*, 491 U.S. 397, 409 (1989), this Court protected Johnson's flag burning as an "expression of dissatisfaction with the policies of the Federal Government." In *Eichman v. United States*, 496 U.S. 310, 318 (1990), this Court further pointed out that government may, by persuasion and example, encourage respect for national symbols and unity, but it may not proscribe speech to achieve those goals.

Second, Petitioners assert a purported "compelling" interest in restricting judicial primary campaign spending because it undermines the public perception about fairness and impartiality of judges. Petitioners fail to explain how a judge who spends one dollar on his campaign is more fair or impartial than one who spends ten thousand dollars. Following through with this illogical argument, lower court judges, saddled with lower

spending limits than their appellate brethren, must be viewed by the public as much more fair to a litigant than an Ohio Supreme Court Justice.

Finally, the Petitioners contend that a "compelling" interest in need of protection is that the judiciary appear to be "neutral and not beholden to contributors". Petitioners cite a popular opinion poll which states that a majority of Ohioans believe campaign contributions influence judicial decisions and that *spending* limits would solve the problem. This argument is contrary to Ohio history and the Ohio Constitution. Through their Constitution, the citizens of Ohio have decided that they *want* politics in the selection of their judiciary. This is why judges in Ohio, at all state court levels, are *elected*. This is why judges in Ohio are elected in party primaries. Politics entails campaigning and money toward that effort. To suggest that the wisdom of the people of the State of Ohio, speaking through their Constitution, should be thrown out the window based upon a voodoo-like popular opinion poll is downright scary. It is even more disturbing that such an opinion is being advocated by these Petitioners.

It cannot seriously be suggested that the State has shown a compelling interest for judicial campaign spending limits. Indeed, spending limits are directly contrary to a compelling state interest in fostering our "propound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open." *New York Times Company v. Sullivan*, 376 U.S. 254, 270 (1964). One of those issues is electing qualified persons to the bench. An informed and knowledgeable electorate is a prerequisite to such elections.

B. Judicial Campaign Spending Limits Burden Political Speech and Do Not Advance Impartiality and/or the Appearance of Impartiality.

The District Court held that judges advocating their election to the bench are engaging in political, not judicial, speech. Petitioners would have this Court believe that speech advocating the election of judges is not "political speech" and therefore is not entitled to the same First Amendment protections as speech advocating election of candidates to the legislature. According to Petitioners, "political speech" is "viewpoint related speech necessary for a voter to make informed decisions for election to political office."

Petitioners narrow definition of political speech is unsupported, in fact or by law. Political speech "relates to the advocacy of the election or defeat of candidates," *Buckley*, 424 U.S. at 47. *In accord*, *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990) (Rhinehart, J. concurring), *ACLU v. Florida Bar*, 744 F. Supp. 1094, 1097 (N.D. Fla. 1990) ("Indeed, when a state decides that its trial judges are to be popularly elected, as Florida has done, it must recognize the candidate's right to make campaign speeches and the concomitant right of the public to be informed about the judicial candidates.")

Buckley's holding is clear, concise, and firm: campaign spending limits are an unconstitutional restriction on the First Amendment protected right to free speech. This Court went on in *Buckley* to explain the effects of campaign spending limits on the First Amendment's guarantee of freedom of speech:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues

> discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies generally dependent on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech. *Buckley*, 424 U.S. at 19.

Buckley's holding has been upheld time and time again.[2]

Petitioners are thus compelled to attempt with trying to distinguish *Buckley* from the facts presented herein. They cannot. Petitioners fail to cite this Court to *one single case* in which *Buckley*'s prohibition on campaign spending limits has been questioned or found inapplicable to other types of elections. As put by the Eighth Circuit Court of Appeals in *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422, 1426 (1995), when reviewing a Missouri statute that limited campaign spending in that state's elections, "This Court is not

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2. *FEC v. National Conservative PAC*, 470 U.S. 480, 491, 105 S. Ct. 1459, 84 L. Ed. 2d 455 (1985) (limitations on campaign expenditures unconstitutional); *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422, 1426 (8th Cir. 1995) (Court not at liberty to disregard *Buckley*; campaign expenditure limits unconstitutional); *Labor's Educational and Political Club v. Danforth*, 561 S.W. 2d 339, 346 (Mo. 1977); ("we must remember that limits on campaign expenditures are unconstitutional." *Buckley, supra*); *Friends of Governor Tom Kean v. New Jersey Election Law Enforcement Commission*, 203 N.J. Super 523, 497 A.2d 555, 561 (1985) (*Buckley* dispositive: independent expenditure limits are unconstitutional); *City of Cincinnati v. Kruse*, U.S. Supreme Court Case No. 98-454.

at liberty to disregard the explicit holdings of *Buckley*." Petitioners have proffered no valid reason to disregard this Court's rule of law in *Buckley*.

Petitioners suggest that *Buckley* was focused on political, not judicial, speech. This case is about regulating the *quantity* of political speech, *not* the content of such speech. It is *not* a case, as Petitioners wish to portray it, about the *content* of political speech, such as that challenged in *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69 (S.D. Ohio 1984), *aff'd.*, 861 F.2d 719 (6th Cir. 1988), *cert. denied*, 490 U.S. 1108 (1989), or *Deters v. Judicial Retirement and Removal Commission*, 873 S.W. 2d 200 (Ky. 1984), *cert. denied*, 115 S. Ct. 194 (1994), or *Stretton v. Disciplinary Board*, 944 F.2d 137 (3d Cir. 1991). The speech at issue in this case is not those observations and discussions that a judge might make on the bench or before an audience regarding a particular case or issue confronting a judge. *It simply involves speech advocating a candidate's qualifications and election for judge*. A judicial candidate, like any other political candidate, has the unfettered right to disseminate his or her qualifications to the electorate.

Buckley cannot be distinguished from this case on the grounds that the goals set forth in *Buckley* are inimical to judicial elections. *Buckley* held that the First Amendment is designed

> to secure the widest possible dissemination of information from diverse and antagonistic sources and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.

Buckley, 424 U.S. at 49. While certainly judicial candidates are bound by Canon VII not to comment on certain justiciable

matters, that is not the issue here. Surely, the goals of *Buckley*, to secure the widest possible "dissemination of information," are content neutral. *Buckley*'s goals are served by eliminating spending limits which suppress the dissemination of a judicial candidate's background, qualifications and expertise for service on the bench.

Finally, Appellants attempt to distinguish *Buckley* because, in *Buckley*, a violation of the election law at issue in that case led to a criminal penalty. This is another distinction without a difference. While there is no criminal penalty for violating Canon VII, there are sanctions — disciplinary sanctions, contempt, fines and assessments of costs (see Supreme Court Rules for Government of the Judiciary Rule II, § 5(E)).

III.

THE JUDICIAL CAMPAIGN SPENDING LIMITS ARE *NOT* NARROWLY TAILORED.

This Court, in *Buckley*, clearly explained why campaign spending limits are never narrowly tailored to serve a compelling government interest: Campaign spending limits "impose direct *quantity* restrictions on political communication," and "restrict the extent of the reasonable use of virtually every means of communicating information." *Buckley*, 424 U.S. at 18 (emphasis added).

This sentiment is reiterated by the Eighth Circuit Court of Appeals in *Shrink Missouri Government PAC v. Maupin*, 71 F.3d 1422, 1426 (1995), *cert. denied*, 116 S. Ct. 2579 (1996):

> Indeed we are hard pressed to discern how the interest of good government could possibly be served by campaign expenditure laws that

> necessarily have the effect of limiting the *quantity* of political speech in which candidates for public office are allowed to engage. *See Buckley*, 424 U.S. at 55-57, 96 S.Ct. at 652-53 (emphasis added).

Petitioners' conclusions that the restrictions are narrowly tailored to serve a compelling interest do not even pass the requirement that there be a nexus between the restriction and the interest. In short, Canon VII(C)(6) does not bear a sufficient relationship to the problem sought to be cured.

> In light of the Canon's restrictions on political expression and association protected under the First Amendment, *Buckley*, 424 U.S. at 14, the court Cannot cavalierly accept without proof that the means being used achieve legitimate ends being sought. Other courts have held that such a failure to establish a nexus is grounds for finding the restriction unconstitutional.

Zeller v. The Florida Bar, 909 F. Supp. 1518, 1526 (N.D. Fla. 1995).

IV.

THE SIXTH CIRCUIT CORRECTLY INTERPRETED *BUCKLEY*, AND THE *BUCKLEY* STANDARD IS THE PROPER STANDARD TO APPLY TO JUDICIAL ELECTIONS.

Having all but conceded defeat, Petitioners purpose that if the standard in *Buckley* was correctly applied, then perhaps this Court's standard in *Buckley* should be changed. Unfortunately, for Petitioners, the Sixth Circuit Court of Appeals properly applied the *Buckley* standard, and more importantly, *Buckley* is the right standard.

The Sixth Circuit Court of Appeals poignantly held:

> Given the fundamental nature of the right involved, this Court is of the opinion that the language of *Buckley* and its progeny have necessarily determined, irrespective of the *kind* of position sought, that any spending restriction in any *electoral* campaign process is an infringement on a candidate's First Amendment rights, and is subject to "exacting scrutiny." *Buckley*, 424 U.S. at 44-45. The guarantees of the First Amendment are not shaped and reshaped simply because a litigant wishes to distinguish one type of election from another. Neither the First Amendment, nor *Buckley* can be read so narrowly.

Sixth Circuit Court of Appeals Opinion, pages 13-14, Appendix A-13 (emphasis original).

CONCLUSION

Petitioners want this Court to bless its deal with the devil, which is the result of a reaction to popular perception, *not* sound constitutional principles. In this era of disillusionment with government and politicians, restrictions on campaign finance are politically popular. Following the "mob," the one group the judiciary is not supposed to cater to, Petitioners enacted judicial campaign spending limits, regardless of the fact that such limits are entirely unrelated to reducing corruption or the appearance of corruption in a state where the State Constitution mandates the election of judges. Under the First Amendment, the government cannot silence political speech, especially the *quantity* of such speech, in the form of campaign spending limits for judges or any other candidates. Simply put, the First Amendment applies to judges and judicial candidates.

Respondents respectfully request the opportunity to litigate the merits of the Amended Canon VII(C)(6)(a); to litigate Canon VII(C)(8); and, to litigate the state substantive due process claim in the District Court below.

WHEREFORE, Respondents Suster and Cleary respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

TIMOTHY J. GRENDELL
Counsel of Record
JOHN W. MONROE
GRENDELL & TARGOVE, L.L.P.
Attorneys for Respondents
Ronald Suster and Patricia Cleary
6060 Rockside Woods Boulevard
Suite 250
Independence, Ohio 44131
(216) 524-6444

Supreme Court, U.S.
FILED
DEC 7 1998
CLERK

No. 98-737

In The

Supreme Court of the United States

October Term, 1998

JONATHAN W. MARSHALL, et al.,

Petitioners,

v.

RONALD SUSTER, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF FOR RESPONDENTS CHRISTOPHER BOYKO, GAIL ROSE KANE AND STUART SAFERIN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN F. BIRATH, JR.
Counsel of Record
WARREN I. GRODY
SARAH J. DEBRUIN
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
(614) 227-2300
(614) 227-2390 (fax)

Attorneys for Respondents Christopher Boyko, Gail Rose Kane, and Stuart Saferin

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Whether the Sixth Circuit abused its discretion in remanding this case to allow the district court to consider amendments to the judicial canon imposing campaign expenditure limits on candidates running for judicial office.

II. Whether this Court's ruling in *Buckley v. Valeo,* 424 U.S. 1 (1976), prohibits the Ohio Supreme Court from imposing campaign spending limits on candidates for elected judicial office in Ohio.

LIST OF PARTIES

Stuart Saferin former Judge, Cuyahoga County Common Pleas Court; judicial candidate, 1996

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Section 6 of the Ohio Constitution:

(A) (1) The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which his court is located.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

Article III of the Code of Judicial Conduct of Ohio:

B. Adjudicative responsibilities

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

Canon VII of the Code of Judicial Conduct of Ohio:

B. Political and campaign conduct in general

(2) A judge or judicial candidate shall not do any of the following:

(c) Make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(d) Make statements that commit or appear to commit the judge or judicial candidate with respect to cases or controversies that are likely to come before the court.

C. Campaign solicitations and expenditures

(5)(a) Except as otherwise provided in division (C)(5)(b) of this canon, the campaign committee of a judicial candidate shall not directly or indirectly solicit or receive in the fund raising period allowed by division (C)(4) of this canon a campaign contribution aggregating more than the following:

(i) From an individual other than the judicial candidate or a member of his or her immediate family, two thousand dollars in the case of a judicial candidate for chief justice or justice of the Supreme Court, five hundred dollars in the case of a judicial candidate for the court of appeals, or two hundred fifty dollars in the case of a judicial candidate for the court of common pleas, municipal court, or county court.

(ii) From any organization, five thousand dollars in the case of a judicial candidate for chief justice or justice

of the Supreme Court or two thousand five hundred dollars in the case of all other judicial candidates.

(iii) From a political party, an amount equal to thirty-five percent of the maximum amount of expenditures permitted to be made by the campaign committee of the judicial candidate pursuant to division (C)(6) of this canon.

Rule II of Ohio Supreme Court Rules for the Government of the Judiciary:

Section 5. Campaign conduct; enforcement and sanctions

(E)(1) Within five days of receiving the report, the Supreme Court shall appoint a commission of five judges as provided in section 2701.11 of the Revised Code and Gov. Jud. R. III. The commission shall expedite its consideration of the report and may make its determination from the report of the hearing panel, permit or require the filing of briefs, conduct a hearing, or order the hearing panel to take additional evidence. If the commission determines by clear and convincing evidence that a violation of Canon 7 has occurred, the commission may enter an order that includes one or more of the following:

(a) A disciplinary sanction against the respondent;

(b) An order enforceable by contempt of court that the respondent cease and desist from engaging in the conduct that was found to be in violation of Canon 7;

(c) A fine imposed against the respondent;

(d) An assessment against the respondent of the costs of the proceeding;

(e) An assessment against the respondent of the reasonable and necessary attorneys fees incurred by the complainant in prosecuting the grievance.

Rule V of the Ohio Supreme Court Rules for the Government of the Bar:

Section 6. Proceedings of the board after filing of the complaint.

(A) Definitions.

(1) Misconduct. "Misconduct" means any violation by a justice, judge, or an attorney of any provision of the oath of office taken upon admission to the practice of law in this state or any violation of the Code of Professional Responsibility or the Code of Judicial Conduct, disobedience of these rules or of the terms of an order imposing probation or a suspension from the practice of law, or the commission or conviction of a crime involving moral turpitude.

(B) Manner of discipline. Any justice, judge, or attorney found guilty of misconduct shall be disciplined as follows:

(1) Disbarment from the practice of law;

(2) Suspension from the practice of law for an indefinite period subject to reinstatement as provided in Section 10 of this rule;

(3) Suspension from the practice of law for a period of six months to two years subject to a stay in whole or in part;

(4) Probation for a period of time upon conditions as the Supreme Court determines, but only in conjunction

with a suspension ordered pursuant to division (B)(3) of this section;

(5) Public reprimand.

STATEMENT OF THE CASE

On September 10, 1996, the trial court issued an order enjoining the Petitioners ("the State") from enforcing Canon VII(C)(6) of the Ohio Code of Judicial Conduct. (A-85). Canon VII(C)(6) imposes limits on campaign expenditures for candidates for the bench in Ohio judicial elections. At issue in this case is Canon VII(C)(6)(d), which in 1996 limited candidates seeking seats on Ohio's courts of common pleas to spending $75,000 to advance their own elections. The trial court's original order prevented the State from enforcing the canon against any judicial candidate in Ohio. At the State's urging, however, the court issued an Amended Order on September 25, 1996, limiting its order to the parties directly before the court. (A-55).

The Honorable Gail Rose Kane, the Honorable Christopher A. Boyko, and the Honorable Stuart Saferin ("the Cleveland Intervenors") were all sitting judges on the Court of Common Pleas for Cuyahoga County when they joined this action. (A-4 – A-5). The Cleveland Intervenors also were candidates in the November 5, 1996 general election and subject to the Ohio Code of Judicial Conduct, including the spending limits imposed by Canon VII(C)(6)(d). (*Id.*) Each of the Cleveland Intervenors had the wherewithal to spend, and intended to spend, sums in excess of the campaign spending cap contained in

Canon VII(C)(6)(d) in order to communicate with the voters of Cuyahoga County regarding his or her individual candidacy. However, if the Cleveland Intervenors exceeded the spending cap, they faced investigations under Rule II, § 5 of the Supreme Court Rules for the Government of the Judiciary of Ohio and possible disciplinary sanctions, including probation suspension or disbarment from the practice of law, fines, cease and desist orders, and an assessment of costs. (*Id.*); Ohio Gov. Jud. R. II, § 5(E)(1); Ohio Gov. Bar R. V, § 6 (A) – (B).

Consequently, on October 15, 1996, the Cleveland Intervenors filed a Verified Complaint in Intervention, a Motion to Intervene, and a Motion for Temporary Restraining Order and Preliminary Injunction. The Court granted the Cleveland Intervenors' Motion to Intervene and Motion for Preliminary Injunction. (A-30). In granting the Motion for Preliminary Injunction, the Court specifically found that any harm which the injunction might cause to the opponents of the Cleveland Intervenors would be overwhelmingly outweighed by the other three factors required for granting injunctive relief: a " 'very high likelihood of success on the merits,' the clear presence of irreparable harm, and the public's core interest in hearing plaintiffs' speech." (A-33).

The State filed a timely appeal to the United States Court of Appeals for the Sixth Circuit. In accordance with the Revised Briefing Schedule for the case, the Cleveland Intervenors were required to file their proof brief with the Court on April 28, 1997. The Cleveland Intervenors filed their brief in a timely manner.

However, after the appeal was perfected and the proof briefs were filed, the Ohio Supreme Court adopted amendments to the Code of Judicial Conduct effective June 1, 1997. These amendments involved changes to Canon VII(C)(6) to include population-based campaign expenditure limits for candidates for the office of judge for common pleas courts in Ohio (hereinafter the "Amended Canon"). The Cleveland Intervenors object to any references to Amended Canon in these proceedings. None of the evidence in the record for this case involves the Amended Canon. The record before this Court contains testimony and documentary evidence gathered at a hearing before the district court for preliminary injunctive relief from the Canon as it existed when the Respondents sought election to the bench in 1996. The Amended Canon did not become effective until almost two months after the Cleveland Intervenors filed their proof brief with the court of appeals, effectively foreclosing any meaningful discussion of the changes in the Canon in the briefs. Final briefs were filed on July 30, 1997. On February 17, 1998, almost seven months after the filing of the final briefs with the court of appeals, the State filed a motion requesting that the Sixth Circuit review the Amended Canon. The Cleveland Intervenors opposed the motion. Following oral arguments on the merits, the Sixth Circuit remanded the case to the district court to consider the Amended Canon. (A-8).

In attempting to turn this appeal into an evidentiary hearing, the State refers to documents outside the record. The Cleveland Intervenors object to any references to any evidence not considered by the trial court, including the American Bar Association's Report and Recommendation

of its Task Force on Lawyer's Political Contributions, and Pennsylvania's Report of the Special Commission to Limit Campaign Expenditures. Neither report is included in the record in this case and cannot be considered. *Adickes v. Kress & Co.*, 398 U.S. 144, 157 n. 16 (1970).

The Cleveland Intervenors also take exception to the State's claim that the Sixth Circuit erroneously considered Canon VII(C)(6) as it existed when the Cleveland Intervenors ran for office. The specific issue before the Sixth Circuit was whether the district court abused its discretion in enjoining the enforcement of Canon VII(C)(6) against the Respondents. In making its ruling, the district court had to weigh four factors: (1) the likelihood of the plaintiffs' success on the merits; (2) irreparable harm in the absence of the injunction; (3) whether the injunction will harm others; and (4) whether the public interest will be served by an injunction. *International Longshoreman's Ass'n Local 1937 v. Norfolk Southern Corp.*, 927 F.2d 900, 903 (6th Cir.), *cert. denied*, 502 U.S. 813 (1991). In determining whether the district court had abused its discretion in granting the injunction, the Sixth Circuit of necessity had to examine whether the record supported the district court's findings. Having determined that the record indeed did support the granting of injunctive relief, the Sixth Circuit has rightly remanded the case to the district court for determination of the constitutionality of the Amended Canon.

REASONS FOR DENYING THE PETITION

The Cleveland Intervenors respectfully request that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Sixth Circuit in this case. Contrary to the State's argument, the court of appeals' decision does not conflict with the decision of any other court of appeals. Instead, the Sixth Circuit has taken the prudent course of remanding the case to allow the district court to examine the Amended Canon in the first instance.

I. The Sixth Circuit did not abuse its discretion in remanding the case to the district court.

The Supreme Court of Ohio altered the judicial canon that the Respondents sought to enjoin after the district court made its ruling granting the preliminary injunction. The State did not ask the court of appeals to consider the Amended Canon until almost seven months after the final briefs were filed. Consequently, the court of appeals was asked to rule on the constitutionality of a provision that the district court had not reviewed and that the parties had not briefed. Rather than rule on the constitutionality of the Amended Canon, the court of appeals remanded to the district court so that it could consider the amendments.

Far from being an abuse of discretion, remanding the case to the district court is the preferred procedure when a change in law does not extinguish a controversy. *See, Concerned Citizens of Vicksburg v. Sills*, 567 F.2d 646, 650 (5th Cir. 1978). Such a course of action comports with the Sixth Circuit's general rule that issues raised for the first

time on appeal are not properly before the court. The court of appeals has "deviated from the general rule in 'exceptional cases or particular circumstances' or when the rule would produce 'a plain miscarriage of justice.' " *Foster v. Barilow*, 6 F.3d 405, 407 (6th Cir. 1993) (citations omitted). *See, also, Holly Farms Corp. v. NLRB*, 517 U.S. 392, 400 n. 7 (1996) (United States Supreme Court generally does not "address arguments that were not the basis of the decision below"). Factors the Sixth Circuit must consider in determining whether to exercise its discretion to deviate from this traditional rule include:

> 1) whether the issue newly raised on appeal is a question of law, or whether it requires or necessitates a determination of facts; 2) whether the proper resolution of the new issue is clear and beyond doubt; 3) whether failure to take up the issue for the first time on appeal will result in a miscarriage of justice or a denial of substantial justice; and 4) the parties' right under our judicial system to have the issues in their suit considered by both a district judge and an appellate Court.

Friendly Farms v. Reliance Ins. Co., 79 F.3d 541, 545 (6th Cir. 1996).

The court of appeals' refusal to address the Amended Canon was not an abuse of discretion. Trial on the merits has not occurred in this case. By remanding the Amended Canon to the district court, the court of appeals is allowing for the full development of the factual record and the

legal arguments of the parties.[1] In our system of justice, such development is crucial to the judiciary's ability to reach meaningful, well reasoned, and correct conclusions. On remand, the State will have ample opportunity to build a record regarding the Amended Canon, and the parties will be given the opportunity to have the issue decided by both the district judge and the appellate court. Justice is served for all parties if the normal course of proceedings is followed. Because no exceptional circumstances dictated otherwise, the court of appeals decision to remand was not an abuse of discretion.

The State cites the case of *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir. 1996) as being in conflict with the Court of Appeal's decision below. However, *Rosenstiel* is clearly distinguishable because in that case, "[b]oth sides strenuously contend[ed] that remand is unnecessary." *Id.* at 1548. In the case below, the Cleveland Intervenors opposed the Sixth Circuit's consideration of the Amended Canon for the first time on appeal. The Respondents face possible disciplinary sanctions under the Canon as it stood in 1996, when they sought election to the common pleas bench in Cuyahoga County. Ohio Gov. Jud. R. II,

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[1] The State argues that the changes to the Canon "requires no new findings of fact or legal arguments." Petition for Writ of Certiorari at 9. However, the State describes the new canon as a "reasonable limit on spending . . . graduated according to the office sought and the population served by the office being sought." *Id.* at 21. There is no evidence in the record regarding the reasonableness of the Amended Canon. For example, there is no evidence regarding how each spending cap was determined for each population size. The only way to determine whether the Amended Canon is reasonable or arbitrary is to remand to the district court for an evidentiary hearing.

§ 5(E)(1); Ohio Gov. Bar R. V, § 6 (A) – (B). In order to prevent those potential sanctions, the case must be remanded to the district court. The trial court will then be in a position to issue a permanent injunction against the State preventing the enforcement of the former Canon against the Petitioners and to hear evidence and build a record regarding the Amended Canon.

The State argues that remanding the case to the district court "is a waste of state, private and judicial resources." Petition for Writ of Certiorari at 12. However, the inevitable result is that the case must be remanded, whether or not this Court grants a writ of certiorari. If certiorari is granted and Respondents prevail, the case will be remanded to the district court for trial on the merits and the granting of a permanent injunction. If certiorari is granted and Petitioners prevail, the case must be remanded to the trial court to allow development of the record to demonstrate that the State's promulgation of the Amended Canon meets any new standard this Court might put forward. The most efficient method of resolving this dispute is the path taken by the court of appeals: remand the case to the district court for consideration of the Amended Canon. Under the Sixth Circuit order, any plaintiff who desires to challenge the Amended Canon can amend his or her Complaint to do so. The parties will then have an opportunity for a full hearing to develop the evidence concerning the Amended Canon, including the basis the State used to justify its spending caps. Those Respondents who do not wish to challenge the Amended Canon are not required to do so. The Cleveland Intervenors have not violated the Amended Canon and should not be forced to pay for an

appeal to this Court in which the State seeks to test the constitionality of a Canon that has not even been reviewed by the court of appeals.

II. The court of appeals did not err in considering the canon as it existed in 1996 when it concluded that the district court properly granted a preliminary injunction.

The State alleges that the court of appeals erred in considering the former Canon VII(C)(6) when it upheld the district court's grant of injunctive relief. Such an argument ignores the procedural posture of the case at the time the court of appeals issued its decision. The trial court granted a preliminary injunction against the State preventing the enforcement of Canon VII(C)(6) against the Respondents and their opponents during the 1996 election campaigns. The question before the court of appeals was not whether Canon VII(C)(6) was unconstitutional, but whether the trial court erred in issuing its preliminary injunction. Consequently, the court of appeals limited "its review to the consideration of the appropriateness of preliminary injunction under the old Canon VII(C)(6) and under Canon VII(C)(8)." (A-8).

In considering whether a preliminary injunction should have issued, the court of appeals considered four factors: "1) whether the movant has demonstrated a strong likelihood of success on the merits; 2) whether the movant would suffer irreparable harm; 3) whether an injunction would cause substantial harm to others; and 4)

whether the public interest would be served by the issuance of such injunction." (A-9). The court below discussed the constitutionality of the former Canon VII(C)(6) solely to determine if the trial court had erred in granting the preliminary injunction.

Respondent complains that the court of appeals limited the discretion of the trial court by considering the constitutionality of the former Canon VII(C)(6). The same argument can be made every time a court of appeals reviews a grant of a preliminary injunction. Of necessity, the reviewing court must examine the likelihood of success of the litigants, and the trial court will be bound by the decision of the court of appeals. Even if the court of appeals somehow could have avoided any discussion of the merits of the former Canon, the district court would not be writing its decision on a blank tablet. The court of appeals did not announce any new constitutional doctrine in reaching its decision. Every point it made in examining the Respondents' likelihood of success is supported by Supreme Court and Sixth Circuit precedent which is already binding on the district court. *E.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *City of Cincinnati v. Kruse*, 142 F.3d 907 (6th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3187, 3243, 3332, 3336 (U.S. Nov. 16, 1998) (No. 98-454). The State's problem is not that the courts' decisions below mandate a finding that the campaign spending caps are unconstitutional, but that *Buckley* and its progeny mandate that caps on spending in election campaigns are an infringement on core First Amendment speech.

III. The court of appeals correctly found that *Buckley v. Valeo* and its progeny prohibit campaign spending caps.

As this Court has consistently held, expenditure limits

> operate in an area of the most fundamental First Amendment activities. Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people." . . . This no more than reflects our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, wide-open."

Buckley v. Valeo, 424 U.S. 1, 14 (1976) (citations omitted).

This Court went on in *Buckley* to explain the effects of campaign spending limits on the First Amendment's guarantee of freedom of speech:

> A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money. The distribution of the humblest handbill or leaflet entails printing, paper, and circulation costs. Speeches and rallies

> generally necessitate hiring a hall and publicizing the event. The electorate's increasing dependence on television, radio, and other mass media for news and information has made these expensive modes of communication indispensable instruments of effective political speech.

Id. at 19.

The Canon at issue here, which restricts expenditures of Ohio judicial candidates, cuts at the core of political expression as described in *Buckley*. The First Amendment right of free speech is a fundamental right, and an infringement of that right, though justified, must be accomplished by the least restrictive means available. *See, e.g., Anderson v. Celebrezze*, 460 U.S. 780, 806 (1983). Political speech, such as that implicated here, is subject to even stricter scrutiny. "When a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 337 (1995); *Shrink Missouri Government PAC v. Maupin*, 892 F. Supp. 1246, 1249 (E.D. Mo. 1995).

This Court does not need to address the State's argument that the Sixth Circuit erred in "rejecting" its purported compelling interest, because the State failed to show that its Canon is the least restrictive means of achieving its goal of preserving the impartiality and the appearance of the impartiality of the judiciary. (A-20). In fact, the State has numerous judicial Canons in place that more directly address its purported compelling interest and are narrowly tailored to serve that interest, unlike

Canon VII(C)(6), which prohibits all political expression once the expenditure limits are reached.

For instance, Canon VII(C)(5)(a) imposes campaign *contribution* limits. This Court has recognized that campaign contribution limits are constitutional because they are more closely related to avoiding corruption and the appearance of corruption than campaign spending caps. *Buckley*, 424 U.S. at 27-29. Canon III(B)(2) requires a judicial candidate to be unswayed "by partisan interests, public clamor, or fear of criticism." Canon III(B)(9) requires a judicial candidate to abstain from public comment about a pending or impending proceeding in any court. Canon VII(B)(2)(c) prohibits judicial candidates from making pledges or promises of conduct in office other than faithful and impartial performance of the duties of the office. Canon VII(B)(2)(d) prohibits a judicial candidate from making statements that commit or appear to commit the candidate "with respect to cases or controversies that are likely to come before the court." Not only do these Canons go directly to the factors of impartiality, and the appearance of impartiality, but they are certainly less restrictive of free speech rights than a cap on campaign spending, which prohibits *all* speech once a candidate reaches the expenditure limit. Because Canon VII(C)(6) is not narrowly tailored, this Court would have to uphold the court of appeals even if it found that the State has an overriding interest in the preservation of the impartiality and the appearance of the impartiality of the judiciary.

Despite the argument of the State to the contrary, the Sixth Circuit did *not* hold that the State lacks a compelling interest in impartiality and the appearance of impartiality of the judiciary. Instead, the court below rightly held that preventing corruption or the appearance of corruption are the only legitimate and compelling interests for restricting campaign finances that this Court has identified to date. (A-19); *Federal Election Comm'n v. NCPAC*, 470 U.S. 480, 496-97 (1984); *City of Cincinnati v. Kruse*, 142 F.3d 907 (6th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3187, 3243, 3332, 3336 (U.S. Nov. 16, 1998) (No. 98-454) (1998); *Zeller v. Florida Bar*, 909 F. Supp. 1518, 1525 (N.D. Fla. 1995). Beginning with *Buckley*, this Court has consistently examined both contribution limits and spending limits in light of this compelling state interest, finding unconstitutional those provisions that limit: 1) a candidate's campaign expenditures, *Buckley*, 424 U.S. at 54-58; 2) a candidate's right to spend his or her own money, *Id.* at 51-54; 3) a person's right to make independent expenditures not coordinated with the candidate or candidate's campaign, *Id.* at 39-51; 4) the right of political committees to make independent expenditures *NCPAC*, 470 U.S. at 497; and 5) the right of political parties to make independent expenditures, *Colorado Republican Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604 (1996). The Sixth Circuit rightly decided that avoiding corruption or the appearance of corruption is not an overriding interest justifying campaign spending limits. (A-20).

Canon VII(C)(6) is a straight-forward cap on the amount of money that judicial candidates and their campaign committees can spend on espousing their candidacy in Ohio. In 1996, the Canon restricted each

candidate for the court of common pleas to spending no more than $75,000 to advocate his or her own election to office. Once that limit was reached, the candidate had no choice but to remain silent. Canon VII(C)(6) thus "reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Buckley*, 424 U.S. at 19. Such a restriction is blatantly contrary to the dictates of the First Amendment and this Court's precedent.

The State argues that candidates for judicial office should not be afforded the same free speech protections as other candidates. However, as the court of appeals correctly found, "an election candidate does not forego his or her First Amendment rights simply because he or she decides to seek a judicial office, rather than a non-judicial one." (A-12). Courts have consistently held that a State's right to regulate speech in a judicial campaign is not unlimited. *E.g., Buckley v. Illinois Judicial Inquiry Bd.*, 991 F.2d 224 (7th Cir. 1993) (striking down judicial canon forbidding judicial candidates from making pledges or promises other than the faithful and impartial performance of duties of the office and from announcing views on disputed legal or political issues); *J.C.J.D. v. R.J.C.R.*, 803 S.W. 2d 953 (Sup. Ct. Ky. 1991) (the same); *ACLU of Florida v. Florida Bar*, 744 F. Supp. 1094 (1990) (the same).

Article IV, § 6 of the Ohio Constitution requires the election of judges to the supreme court, the courts of appeals, the courts of common pleas, and divisions of the courts of common pleas. As long as Ohio retains its system of electing judges to office, judicial candidates must be allowed to provide information to voters to

enable the electorate to make meaningful choices. As this Court recognized in *Buckley*, virtually every means of communicating in today's society involves the expenditures of money. If Ohio judicial candidates are deprived of these "indispensable instruments of political speech," the aim of the First Amendment to protect and ensure open, robust debate on public issues is all but destroyed. *Buckley*, 424 U.S. at 19.

CONCLUSION

For the foregoing reasons, Respondents Boyko, Kane, and Saferin respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

JOHN F. BIRATH, JR.
Counsel of Record
WARREN I. GRODY
SARAH J. DEBRUIN
BRICKER & ECKLER LLP
100 South Third Street
Columbus, Ohio 43215-4291
(614) 227-2300
(614) 227-2390 (fax)

Attorneys for Respondents Christopher Boyko, Gail Rose Kane, and Stuart Saferin

Date: December 7, 1998

No. 98-737 (6)

Supreme Court, U.S.
FILED
DEC 7 1998
CLERK

In The

Supreme Court of the United States

October Term, 1998

JONATHAN W. MARSHALL, et al.,

Petitioners,

v.

RONALD SUSTER, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE SECRETARIES OF STATE OF CONNECTICUT, GEORGIA, MAINE, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, OREGON, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, WEST VIRGINIA AND WISCONSIN; THE GENERAL COUNSEL FOR THE CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION; THE EXECUTIVE DIRECTOR OF THE CAMPAIGN SPENDING COMMISSION OF HAWAII; THE DIRECTOR OF THE REGISTRY OF ELECTION FINANCE OF KENTUCKY; AND THE EXECUTIVE DIRECTOR OF THE ETHICS COMMISSION OF OKLAHOMA IN SUPPORT OF PETITIONERS

BRENDA WRIGHT
Counsel of Record
JOHN C. BONIFAZ
GREGORY LUKE
National Voting Rights Institute
294 Washington Street, Suite 713
Boston, Massachusetts 02108
(617) 368-9100

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE SECRETARIES OF STATE OF CONNECTICUT, GEORGIA, MAINE, MASSACHUSETTS, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, OREGON, RHODE ISLAND, SOUTH CAROLINA, TENNESSEE, WEST VIRGINIA, AND WISCONSIN, THE GENERAL COUNSEL OF THE CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION, THE EXECUTIVE DIRECTOR OF THE CAMPAIGN SPENDING COMMISSION OF HAWAII, THE DIRECTOR OF THE REGISTRY OF ELECTION FINANCES OF KENTUCKY, AND THE EXECUTIVE DIRECTOR OF THE ETHICS COMMISSION OF OKLAHOMA IN SUPPORT OF PETITIONERS

Leave to file a brief *amicus curiae* in support of petitioners is sought by the following Secretaries of State: Miles S. Rapoport of Connecticut, Lewis A. Massey of Georgia, Dan A. Gwadosky of Maine, William Galvin of Massachusetts, Joan A. Growe of Minnesota, Eric Clark of Mississippi, Rebecca Cook of Missouri, Mike Cooney of Montana, Dean Heller of Nevada, William Gardner of New Hampshire, Stephanie Gonzales of New Mexico, Phil Keisling of Oregon, James Langevin of Rhode Island, Jim Miles of South Carolina, Riley C. Darnell of Tennessee, Ken Hechler of West Virginia, and Douglas J. La Follette of Wisconsin. Leave is also sought on behalf of Steven G. Churchwell, General Counsel, California Fair Political Practices Commission, Robert Watada, Executive Director of Campaign Spending Commission of Hawaii, George Russell, Director of Registry of Election Finances of Kentucky, and Marilyn Hughes, Executive Director of Ethics Commission of Oklahoma. In these positions, *amici*

serve as chief election officers or supervisors of campaign finance in their States.

Because of their responsibility for, and familiarity with, the conduct of state election campaigns, *amici* have a vital interest in the issues presented in this case. *Amici* have witnessed the serious threats that unlimited campaign spending poses to the integrity and health of the political process. The Sixth Circuit's erroneous interpretation of *Buckley v. Valeo*, 424 U.S. 1 (1976), in this case threatens to stifle campaign reforms at the state and local level that are badly needed to preserve the health of our democratic system of government. Acceptance of the Sixth Circuit's decision will impair states' ability to combat widespread public cynicism about elected officials' ability to govern in the public interest. That cynicism is fueled by the reality that, as campaign spending by candidates for office increases exponentially, the need for unlimited campaign funds leaves candidates vulnerable to both the reality and appearance of improper influence by wealthy interests. *Amici* wish to file the annexed brief to illuminate the harms caused by an overly restrictive reading of *Buckley*, and to explain why *Buckley* should not be read to foreclose states and localities from responding to new compelling interests and new factual circumstances – not addressed 22 years ago in *Buckley* itself – which may justify reasonable limits on campaign spending.

The petitioners, together with respondents Suster, Cleary, Smith, Durkin and Lisotto, have consented to the filing of this brief *amicus curiae* (letters on file with Court). Respondents Boyko, Kane and Seferin have declined to respond to *amici's* request for their consent to

the filing of this brief, and *amici* therefore assume that they do not consent to the filing of the brief.

For the reasons stated, *amici* respectfully request that their motion for leave to file a brief *amicus curiae* in support of petitioners be granted.

Respectfully submitted,

BRENDA WRIGHT
Counsel of Record
JOHN C. BONIFAZ
GREGORY LUKE
National Voting Rights Institute
294 Washington Street
Suite 713
Boston, Massachusetts 02108
(617) 368-9106

Counsel for Amici Curiae

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INTEREST OF AMICI

Amici include the following Secretaries of State: Miles S. Rapoport of Connecticut, Lewis A. Massey of Georgia, Dan A. Gwadosky of Maine, William Galvin of Massachusetts, Joan A. Growe of Minnesota, Eric Clark of Mississippi, Rebecca Cook of Missouri, Mike Cooney of Montana, Dean Heller of Nevada, William Gardner of New Hampshire, Stephanie Gonzales of New Mexico, Phil Keisling of Oregon, James Langevin of Rhode Island, Jim Miles of South Carolina, Riley C. Darnell of Tennessee, Ken Hechler of West Virginia, and Douglas J. La Follette of Wisconsin.[1] *Amici* also include Steven G. Churchwell, General Counsel, California Fair Political Practices Commission, Robert Watada, Executive Director of Campaign Spending Commission of Hawaii, George Russell, Director of Registry of Election Finances of Kentucky, and Marilyn Hughes, Executive Director of Ethics Commission of Oklahoma. In these positions, *amici* serve as chief election officers or supervisors of campaign finance in their States. They thus have considerable experience with the issues raised in this case, and in particular have witnessed the serious threats that unlimited campaign spending poses to the integrity and health of the political process.

Amici seek review of the Sixth Circuit's decision in this case because that court's interpretation of *Buckley v. Valeo*, 424 U.S. 1 (1976), threatens to stifle campaign

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[1] Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* made a financial contribution to the preparation or submission of this brief.

reforms at the state and local level that are badly needed to preserve the health of our democratic system of government. A number of states and localities have enacted campaign finance regulations similar to the one at issue here, based on their belief that such regulations are necessary to combat widespread public cynicism about elected officials' ability to govern in the public interest. That cynicism is fueled by the reality that, as campaign spending by candidates for office increases exponentially, the need for unlimited campaign funds leaves candidates vulnerable to both the reality and appearance of improper influence by wealthy interests. Many more states and localities would doubtless enact regulations similar to those at issue here if permitted to do so under a proper interpretation of the First Amendment. *Buckley* should not be read to foreclose states and localities from responding to new compelling interests and new factual circumstances – not addressed 22 years ago in *Buckley* itself – which may justify reasonable limits on campaign spending.

STATEMENT

This case involves a regulation adopted by the Ohio Supreme Court, following extensive deliberation, that places reasonable limits on total campaign expenditures in elections for judicial office in Ohio. The current limits, set forth in Canon VII(C)(6)(a) of the Code of Judicial Conduct of the Ohio Supreme Court, are graduated based on the level of judgeship sought and, with respect to trial court elections, the population of the court's territorial jurisdiction. The plaintiffs and plaintiff-intervenors below

all were candidates seeking election or re-election as judges for various courts of common pleas (the trial courts of general jurisdiction in Ohio). For those judgeships, the expenditure limits range from $125,000 for jurisdictions whose population exceeds 750,000 down to $50,000 for jurisdictions whose population is 100,000 or less.[2]

The Ohio Supreme Court adopted these expenditure limits in response to the serious threat to public confidence in the judicial system caused by ever-increasing spending in judicial campaigns. This spending and the resultant dominance of money in determining judicial election outcomes have created an intolerable public perception of "justice for sale," as amply documented by survey research and other evidence before the Ohio Supreme Court. In adopting reasonable expenditure limits for judicial races, the Ohio Supreme Court sought to limit the danger of actual *quid pro quo* corruption and, equally importantly, to combat the appearance of corruption that is inimical to public confidence in the system of justice.

The Sixth Circuit held that any expenditure limits for judicial elections are unconstitutional under the First Amendment as a matter of law, based on this Court's

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[2] The limits currently in effect reflect an amendment to Canon VII(C)(a)(6) that was adopted by the Ohio Supreme Court prior to the Sixth Circuit's consideration of the petitioners' appeal. Prior to that amendment, a uniform expenditure limit of $75,000 applied to all judicial candidates for any court of common pleas, municipal court, or county court.

decision striking down limits on spending in federal campaigns for political offices in *Buckley v. Valeo*, 424 U.S. 1 (1976). App. A-1 – A-26. The Sixth Circuit's decision did not address the reasonableness of the particular limits adopted by the Ohio Supreme Court, nor did it give any weight to the differences between judicial election campaigns and campaigns for legislative or executive offices. Instead, the court below ruled that "the language of *Buckley* and its progeny have necessarily determined, irrespective of the kind of position sought, that *any* spending restriction in *any* electoral campaign process is an infringement on a candidate's First Amendment rights. . . . " App. A-13 (emphasis added).

REASONS FOR GRANTING THE PETITION

This case presents an issue of the most pressing national importance: whether, consistent with this Court's 1976 decision in *Buckley v. Valeo*, states may ever enact reasonable limits on campaign spending to serve compelling state interests, including the state's vital interest in maintaining public confidence in an impartial judiciary. Further, if *Buckley* properly is read as a *per se* ban on all spending limits, no matter what the factual context for their adoption, no matter what the nature of the office to which the limits apply, and no matter how reasonable the limits, this case presents the critically important question of whether *Buckley*, to that extent, should be overruled.

The Ohio Supreme Court is not alone in determining that, 22 years after this Court's decision in *Buckley*, unlimited campaign spending has come to threaten the health

of our democratic institutions in ways never contemplated at the time *Buckley* was decided. Last year, the State of Vermont enacted campaign spending limits for its state elections, to take effect in the 2000 election cycle.[3] The City of Cincinnati enacted spending limits for city council campaigns in 1995.[4] Since 1974, the City of Albuquerque has maintained limits on campaign expenditures for its local elections.[5] This year, a special commission appointed by the Supreme Court of Pennsylvania issued a report recommending the adoption of limits on campaign spending in Pennsylvania judicial elections.[6]

States and localities increasingly are adopting and defending reasonable campaign spending limits because they have concluded that the enormous amounts of money now expended to win election to public office foster the appearance and reality of corruption in a manner that undermines the integrity of our democratic processes.[7] The reading of *Buckley* adopted by the court

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[3] Vt. Stat. Ann. Tit. 17, § 2805a.

[4] City of Cincinnati Ordinance No. 240-1995. Cincinnati's spending limits also have been struck down by the Sixth Circuit. *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3336 (U.S. November 16, 1998).

[5] Albuquerque, New Mexico Charter, Election Code, art. XII, § 4. *See* Robert Zausner, *Campaign spending limit? In Albuquerque, it's old hat*, Philadelphia Inquirer, October 23, 1998, A-1; Dana Milbank, *Renewed Battle Brewing on Campaign-Spending Caps*, The Wall Street Journal, March 24, 1998, A-23.

[6] Special Commission to Limit Campaign Expenditures, *Report* (1998).

[7] The United States Congress has also demonstrated interest in employing spending limits for federal elections. Members of Congress have introduced campaign spending limit

below, which prevents any thoughtful consideration of the justifications for spending limits, regardless of the facts or context, would stifle reforms that are widely perceived as necessary by state and local governments across the nation. Review of the Sixth Circuit's decision by this Court is thus a matter of paramount national interest.

Amici wish to emphasize two related reasons why this Court should review and reverse the Sixth Circuit's decision striking down Ohio's expenditure limits for judicial elections. First, it is critically important for this Court to make clear that *Buckley* does not foreclose consideration of new facts and new interests supporting state and local regulation of campaign spending, particularly interests that were never considered or discussed in *Buckley* itself. One such interest presented in this case is the compelling state interest in assuring that the need to raise ever-increasing amounts of money for judicial election campaigns does not compromise judicial independence and public confidence in the integrity of the elected judiciary. The impact of unlimited campaign spending on judicial elections and the integrity of the judicial process was never considered by this Court in *Buckley*. Accordingly, the court below erred in assuming that *Buckley*

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bills eleven times since this Court's ruling in *Buckley*. S. 1684, 98th Cong. § 1 (1983); S. 1185, 98th Cong. § 1 (1983); S. 59, 99th Cong. § 1 (1985); H.R. 2473, 100th Cong. § 1 (1987); H.R. 1456, 101st Cong. § 1; H. Res. 168, 103rd Cong. § 1 (1993); H.R. 3571, 103rd Cong. § 1 (1993); H.R. 3651, 104th Cong. § 2 (1996); H.R. 3658, 104th Cong. § 2 (1996); S. 1057, 105th Cong. § 1 (1997); H.R. 77, 105th Cong. § 1 (1997).

creates a *per se* bar to states' adoption of reasonable spending limits for judicial campaigns.

Second, the Sixth Circuit's decision rests on the erroneous assumption that, as a matter of law, contribution limits alone are sufficient to assure public confidence in the integrity of the election process. That assumption is flatly contradicted by this nation's 22 years of experience with relying on contribution limits alone as a shield against corruption and the appearance of corruption in electoral politics at the federal level. Under the current regime of limited contributions but unlimited spending, monied interests nevertheless exert overwhelming influence over the electoral process through practices such as bundling – that is, the coordinated donation of campaign contributions from individuals representing the same corporation, industry or special interest – and other stratagems.[8] Further, the fear that an opponent will spend vast sums of money in pursuit of a campaign victory has fueled a never-ending set of schemes to evade contribution limits where they exist. The uncritical assumption that contribution limits alone are sufficient to preserve the integrity of the electoral process is no longer sufficient, if it ever was, to justify the wholesale invalidation of reasonable regulations on campaign spending.

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[8] *See, e.g.*, Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126, 1140-1142 (1994); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 Yale L. & Pol'y Rev. 273, 326-327 (1993) (citing Larry Makinson, Center for Responsive Politics, *Open Secrets: The Encyclopedia of Congressional Money & Politics* (2d ed. 1992)).

I. *BUCKLEY* DID NOT FORECLOSE STATES' RELIANCE ON NEW AND COMPELLING GOVERNMENTAL INTERESTS SUPPORTING CAMPAIGN SPENDING LIMITS.

The Sixth Circuit improperly read this Court's decision in *Buckley* as foreclosing the possibility that spending limits for judicial election campaigns could be justified by Ohio's compelling interest in limiting the reality and appearance of improper influences on judicial decisionmaking. *Buckley,* which addressed spending limits only in the context of political campaigns for Congress and federal executive office, cannot be read as foreclosing consideration of a state interest in preserving judicial independence that was never discussed or even mentioned in this Court's 1976 ruling. Rather, this Court stated: "No governmental interest *that has been suggested* is sufficient to justify [the congressional campaign spending limits]." *Buckley,* 424 U.S. at 55 (emphasis added). The implication is clear that the door remains open to consideration of compelling governmental interests that were not suggested to the *Buckley* Court.

The important differences between judges and holders of political offices, such as legislators and executive officials, plainly have First Amendment significance. In legislative campaigns, for example, candidates are expected to vie for public support by stating the positions they will take on important public policy issues, and the content of such campaign statements cannot ordinarily be regulated by the government. *See generally Brown v. Hartlage,* 456 U.S. 45 (1982). The opposite is true of campaigns for judicial office. Thus, Canon VII(B)(2) of the Ohio Code of Judicial Conduct, like provisions adopted in many

states that elect their judges, directly restricts the very *content* of permissible speech in judicial election campaigns. It provides:

> A judge or judicial candidate shall not * * * [m]ake speeches for a political organization[,] * * * [m]ake pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office[,] * * * [make] statements that commit or appear to commit the judge or judicial candidate with respect to cases or controversies that are likely to come before the court.

Such limitations on judicial campaign speech, despite the content restrictions they contain, repeatedly have been upheld by the courts.[9]

The decisions upholding restrictions on judicial election campaigns against First Amendment challenge rests

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[9] *See Stretton v. Disciplinary Board of Supreme Court of Pa.*, 944 F.2d 137, 142 (3rd Cir.1991) (upholding restrictions preventing judicial candidates from commenting on issues likely to come before them as judges and from personally soliciting campaign contributions); *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69, 75 (S. D. Ohio 1984), *aff'd*, 861 F.2d 719 (6th Cir. 1988) (upholding ban on campaign pledges on disputed legal or political issues); *Ackerson v. Kentucky Judicial Retirement & Removal Comm'n*, 776 F. Supp. 309, 315 (W.D. Ky. 1991) (upholding restrictions on judicial candidates' discussion of legal issues likely to come before court while permitting discussion on issues of court administration); *Deters v. Judicial Retirement & Removal Comm'n*, 873 S.W.2d 200 (Ky 1994), *cert. denied*, 115 S. Ct. 194 (1994) (same); *In re Code of Judicial Conduct*, 603 So. 2d 494 (Fla. 1992) (upholding canon prohibiting judges from publicly endorsing other candidates for office).

on the state's compelling interests in assuring an impartial judiciary and preserving public confidence in the courts. Indeed, commentators have noted that restrictions on judicial campaigns are justified by the due process interests of the litigants who will appear before the court – interests that properly outweigh the judicial candidate's personal interest in unfettered political expression during a campaign. Randall Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics, 1059, 1060 (1996).

These same compelling interests – which were never considered by the *Buckley* Court in addressing restrictions on federal election campaigns – deserve at least equal weight in determining the scope of permissible regulation of campaign spending in judicial elections. Indeed, because campaign spending limits, unlike direct restrictions on judicial candidates' campaign speech, are content-neutral, the case for permitting reasonable state regulation of such spending is even stronger.

A recent report by the ABA Task Force on Lawyers' Political Contributions notes the problems inherent in a regime of ever-escalating expenditures on judicial election campaigns:

> Of course the greater the sums raised, the greater are all the problems: the pressure on lawyers to contribute, the judges' time and attention that will likely be given to fund-raising, the judges' dependence – or appearance of

> dependence – on the fund-raisers and the contributors, and the erosion of public confidence.[10]

The record before the Ohio Supreme Court amply demonstrated that these potential threats to public confidence in the judiciary have become a reality in Ohio. In 1980, $100,000 was expended on the election for Chief Justice of the Ohio Supreme Court; by 1986, the race for Chief Justice involved an expenditure of $2,700,000.[11] The escalating cost of competing for a judicial seat has fueled deep public cynicism about the integrity of Ohio's judicial system. In a survey commissioned by the Ohio Supreme Court and conducted by the University of Cincinnati Institute of Public Policy, 89% of respondents said they believed that "decisions made by judges in their courtrooms are influenced by contributions made to their election campaigns" at least some of the time, with 23% of these respondents saying that decisions were so influenced *most* of the time, and another 8% saying that judicial decisions were *always* influenced by campaign contributions. Affidavit of Professor Alfred Tuchfarber (reporting on survey research). Respondents also believed that campaign spending limits would be the most useful method of limiting the influence of contributions on judicial decisions, with 89% believing that such limits would be at least somewhat useful. *Id.* Such documentation of the loss of public confidence in the judiciary provides crucial support for the reforms adopted by

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[10] American Bar Association Task Force on Lawyers' Political Contributions, *Report and Recommendations Regarding Contributions to Judges and Judicial Candidates* (1998) (hereafter, "ABA Task Force Report") at 16.

[11] *Id.* at 16.

Ohio. *See CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973) (observing that avoiding appearance of improper influence "is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.")

Ohio's concerns about the public's eroding confidence in the elected judiciary are echoed by findings in other states where spending in judicial elections has undergone dramatic increases. In March 1998, a special commission appointed by the Pennsylvania Supreme Court to investigate judicial campaign spending concluded that the public's growing distrust of the judiciary's impartiality necessitated the adoption of limits on campaign spending:

> The Commission was . . . moved to urge the adoption of this reform [spending limits] because without it the "dash for cash" identified as a root cause for citizen distrust would not only continue but will increase dramatically. Such skyrocketing campaign expenditures and the apparent disastrous effect upon the perception of judicial integrity caused thereby, have prompted other jurisdictions to move ahead with this concept despite *Buckley*.[12]

A survey conducted for the Commission to assess public attitudes toward judicial campaign expenditures demonstrated that "[v]oters in Pennsylvania strongly believe that the amount of money in judicial elections threatens

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[12] Special Commission to Limit Campaign Expenditures, *Report* (1998) at 10.

both the integrity and fairness of those elections, as well as the rulings that judges make in their courtrooms."[13]

Other states as well, from Alabama to Wisconsin, have seen dramatically escalating spending on judicial elections,[14] turning judicial campaigns into an arms race in which greater and greater amounts of money must be raised by judicial candidates, often from the very lawyers and litigants who appear before the courts. As the ABA Task Force on Lawyers' Political Contributions has noted:

> [F]or many litigants, one case is all that matters. We are told that it is not uncommon practice for a potential client to ask an attorney what, if any, relationship the attorney has with a particular judge; further, that many attorneys will include in their response that, *e.g.*, they were on the judge's reelection committee or were a major contributor.[15]

Ever-increasing campaign expenditures not only threaten the integrity of the judicial system by making campaign contributors ever more important to judicial candidates, but also by requiring judges to devote inordinate amounts of time to fundraising. States have a compelling interest in assuring that judges' time is not dominated by the need to amass campaign war chests. As noted by the ABA Task Force on Lawyers' Political Contributions, "[f]undraising and campaigning are often distracting and always take time: during at least most of a judge's years on the bench, she or he should judge, not

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[13] *Id.* at 5.

[14] ABA Task Force Report at 15 & Appendix 3.

[15] *Id.* at 27-28 n.47.

campaign."[16] The state's compelling interest in freeing elected judges from fundraising burdens, like the state's overall interest in protecting judicial independence, provides a justification for spending limits that was never considered or discussed by this Court in *Buckley*.[17]

II. CONTRIBUTION LIMITS ALONE ARE INSUFFICIENT TO PROTECT STATES' COMPELLING INTEREST IN PROTECTING THE INTEGRITY OF JUDICIAL ELECTIONS.

The court below erroneously ruled that unlimited campaign spending poses no danger of corruption or the appearance of corruption in judicial elections so long as the amount that individual contributors may give to a candidate is subject to limits. App. A-19-20. This holding ignores reality.

When campaign spending is unlimited, a candidate's need for money is also unlimited, because the candidate can never be sure whether his or her opponent will raise greater funds and thereby obtain a campaign advantage. Limiting the amount that each individual or PAC may contribute does little to alleviate this problem, because such limits do not affect the candidate's need to maximize the overall amount of money obtained from donors

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[16] *Id.* at 48 n. 83.

[17] *See generally* Vincent A. Blasi, *Free Speech and the Widening Gyre of Fundraising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281 (1994) (discussing state interest in reducing fundraising burden on candidates generally as basis for constitutionality of reasonable spending limits).

generally. The need for unlimited amounts of money, in other words, makes each additional donation of tremendous value to a candidate, and thus increases the candidate's dependence on potential contributors. Contributors allied with industries or special interest groups that can funnel large numbers of donations to the candidate are especially valuable under a regime of unlimited spending, and candidates thus become increasingly dependent upon such interests despite the existence of contribution limits.

By contrast, if overall expenditures are subject to an outside limit, the value to the candidate of each additional contribution decreases. A donor whose assistance may appear compromising can be turned away without dramatically harming the candidate's competitiveness, because the candidate has a greater ability to find those funds elsewhere and still remain on an even footing with challengers.

These dynamics explain why a regime of contribution limits combined with unlimited campaign spending has been such a dismal failure in curbing corruption and the appearance of corruption at the federal level in the 22 years since *Buckley*. States should not be compelled to extend this failure to judicial elections.

Texas' experience is illustrative. Texas has become notorious for the battle that has raged between the trial lawyers (widely perceived as controlling Texas Supreme Court elections during the 1980s) and the insurance industry (now widely perceived as having wrested control of the court from the trial lawyers as a result of massive spending on judicial election campaigns during

the 1990s). Texas adopted contribution limits for judicial elections,[18] but such limits clearly have not been successful in curbing the influence of special interest spending on judicial campaigns,[19] as highlighted by a recent "60 Minutes" broadcast on the subject:

> [60 MINUTES CORRESPONDENT MIKE] WALLACE: Back in 1987, when we did the first piece here, where were the justices at that time getting their contributions from?
>
> Mr. WALT BORGES: They were getting a lot of their contributions from the lawyers, the consumers' lawyers.
>
> WALLACE: Plaintiffs' lawyers.
>
> Mr. BORGES: Plaintiffs' lawyers.
>
> WALLACE: Who won most cases?
>
> Mr. BORGES: The studies that we – we did show that about 67 percent of the time, two-thirds of the time, the plaintiffs won the cases in 1987.
>
> WALLACE: And today?
>
> Mr. BORGES: Today, the defendant wins 69 percent of the time.

---

[18] Tex. Elec. Code Ann. § 253.155(a) and .157 (Supp. 1997).

[19] Bill Medaille and Andrew Wheat, Texans for Public Justice, *Payola Justice: How Texas Supreme Court Justices Raise Money From Court Litigants*, Summary (1998) (finding, among other things, that "[p]arties and lawyers with official business on the court's 1994-1997 docket – or contributors closely linked to these docket parties – contributed 40 percent ($3.7) million of the $9.2 million that the seven justices raised); *see id.* at 6, 30 (noting failure of contribution limits to stem electoral influence of parties and lawyers with business before the court).

> WALLACE: (Voiceover) By "defendant," Borges means the business and insurance companies who are being sued.
>
> How do insurance companies fare before this court?
>
> Mr. BORGES: The insurance companies win roughly 90 percent of the time.
>
> WALLACE: What you're saying is it went 180 degrees the other way.
>
> Mr. BORGES: The philosophy of the court has shifted. If there is a bias in 1985, there is now a bias in the . . . opposite direction in 1998.

CBS 60 Minutes, *Justice for Sale*, November 1, 1998, Transcript at 2-3.

Public opinion polls at the national level confirm that citizens on all sides of the political spectrum perceive both actual and potential corruption in government under the current system of unlimited campaign spending, notwithstanding the existence of federal contribution limits. Notably, in a 1996 poll taken directly after the November elections, Americans ranked the "power of special interest groups in politics" second only to "international terrorists" when asked to identify major threats to the future of the country.[20] A 1997 poll determined that three-quarters of Americans believe that "public officials make or change policy decisions as a result of money they

---

[20] Princeton Survey Research Associates/Pew Research Center, *Public Opinion Survey* (November 1996) (available at *http://www.people-press.org/unionrpt.htm).*

receive from major contributors."[21] Further, although polls often used to show that voters trusted their own congressional representatives while decrying corruption in general, even that has changed. An August 1998 poll of voters in eight states showed that between 65% and 75% of voters now believe that campaign contributions affect the votes of their own senators on issues of concern to special interests.[22] The lesson from 22 years of experience since *Buckley* is clear: relying upon contribution limits alone is insufficient to prevent a debilitating loss of faith by citizens in the honesty of government.

When this Court issued its *Buckley* decision in 1976, both contribution limits and spending limits were new at the federal level. The Court's ruling striking down FECA's low spending limits on federal election campaigns should be recognized for what it was: an assessment that, on the record then before the Court, the new contribution limits alone appeared sufficient to protect the important governmental interests of preventing corruption and the appearance of corruption. As the *Buckley* Court found:

> There is no indication [in the record] that the substantial criminal penalties for violating the contribution ceilings combined with the political

---

[21] *See* Francis X. Clines, *Most Doubt a Resolve to Change Campaign Finance Reform, Poll Finds*, N.Y. Times, Apr. 9, 1997, at A1.

[22] The Mellman Group, Inc./Public Campaign, *Public Opinion Poll* (August 1998) (available at *http://www.publicampaign.org/poll9_3_98.html*).

> repercussion of such violations will be insufficient to police the contribution provisions. *Buckley*, 424 U.S. at 55-56.

This pivotal passage reveals that a key empirical judgment – drawn from the record – ultimately determined the constitutionality of the congressional campaign spending limits. For what if the record in *Buckley* had established that the "substantial criminal penalties" and the "political repercussions" were *not* sufficient to "police the contribution provisions?" Clearly, *Buckley* did not foreclose the possibility that a different factual record would justify the need for campaign spending limits.

In the alternative, if *Buckley* must indeed be read to preclude any consideration of changed facts and circumstances that could justify reasonable limits on campaign spending, this Court should now revisit that ruling. A ruling forever closing the door to the lessons of governmental experience with unlimited campaign spending runs contrary to the constitutional responsibilities of this Court. As this Court stated in *Planned Parenthood v. Casey*, 505 U.S. 833, 864 (1992):

> In constitutional adjudication as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

BRENDA WRIGHT
Counsel of Record
JOHN C. BONIFAZ
GREGORY LUKE
NATIONAL VOTING RIGHTS INSTITUTE
294 Washington Street
Suite 713
Boston, Massachusetts 02108
(617) 368-9100

Counsel for Amici Curiae

December 1998

Supreme Court, U.S.
FILED
DEC 7 1998
CLERK

No. 98-737

In The

Supreme Court of the United States

October Term, 1998

JONATHAN W. MARSHALL, ET AL.,

Petitioners,

v.

RONALD SUSTER, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI OF ARIZONA, CONNECTICUT, FLORIDA, HAWAII, IDAHO, IOWA, KANSAS, KENTUCKY, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA AS AMICI CURIAE IN SUPPORT OF PETITIONERS

THOMAS J. MILLER
Iowa Attorney General
ELIZABETH M. OSENBAUGH*
**Counsel of Record*
Solicitor General
Hoover Building, 2nd Floor
Des Moines, IA 50319
(515) 281-3349
Counsel for Amici Curiae States

(Additional Counsel On Inside Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

26 pp

GRANT WOODS
Attorney General
State of Arizona

RICHARD BLUMENTHAL
Attorney General
State of Connecticut

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

MARGERY S. BRONSTER
Attorney General
State of Hawaii

ALAN G. LANCE
Attorney General
State of Idaho

CARLA J. STOVALL
Attorney General
State of Kansas

ALBERT B. CHANDLER, III
Attorney General
State of Kentucky

J. JOSEPH CURRAN, JR.
Attorney General
State of Maryland

SCOTT HARSHBARGER
Attorney General
State of Massachusetts

FRANK J. KELLEY
Attorney General
State of Michigan

JEREMIAH W. (JAY) NIXON
Attorney General
State of Missouri

JOSEPH P. MAZUREK
Attorney General
State of Montana

FRANKIE SUE DEL PAPA
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Attorney General
State of New Hampshire

MICHAEL F. EASLEY
Attorney General
State of North Carolina

HEIDI HEITKAMP
Attorney General
State of North Dakota

W.A. DREW EDMONDSON
Attorney General
State of Oklahoma

JAN GRAHAM
Attorney General
State of Utah

WILLIAM H. SORRELL
Attorney General
State of Vermont

CHRISTINE O. GREGOIRE
Attorney General
State of Washington

DARRELL V. MCGRAW
Attorney General
State of West Virginia

QUESTIONS PRESENTED

1. Whether the Sixth Circuit erred by reviewing the law as it existed at the time the lawsuit was filed, rather than the amended version effective at the time of the appellate court's review.

2. Whether, consistent with this Court's ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), reasonable, population-based limitations on campaign spending in judicial elections are narrowly tailored to serve the compelling state interests of the preservation of impartiality and the appearance of impartiality of the judiciary, or, in the alternative, whether the standard articulated in *Buckley* is inappropriately applied to judicial campaigns.

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INTERESTS OF THE AMICI

The State of Iowa and twenty-one other states[1] join this brief in support of the petition for certiorari filed by John W. Marshall, et al., of the Ohio Supreme Court. At issue is whether *Buckley v. Valeo*, 424 U.S. 1 (1976), bars all judicial campaign spending limitations without regard to the unique interests of states in preserving the independence and integrity of the judiciary and protecting the due process rights of litigants. If *Buckley* does mandate rejection of judicial spending limits, *Buckley* should be reconsidered and overruled in light of new facts and circumstances and new compelling governmental interests justifying such limits.

This is a case of great significance. All states, however they select judges, have a compelling interest in preventing partiality in adjudication, assuring judicial integrity, and assuring public belief in the judicial system. Thirty-eight states use some type of elective system to select or retain judges for all or some of their state courts. Of those states, thirteen utilize nonpartisan elections to select all judges: Georgia, Idaho, Kentucky, Michigan, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oregon, Washington, and Wisconsin. Eight states hold partisan elections to select their judiciary: Alabama, Arkansas, Illinois, Louisiana, North Carolina, Pennsylvania, Texas and West Virginia. An additional seventeen states elect a portion of their judges or require judges to stand for retention elections: Alaska, Arizona, California,

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[1] The State of New Hampshire, which has no judicial elections, joins in parts II and III.

Colorado, Florida, Indiana, Iowa, Kansas, Maryland, Missouri, Nebraska, New Mexico, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming. American Judicature Society, Judicial Selection in States (March 1998).

The amici states have a compelling interest in preventing corruption and the appearance of corruption in all state political elections. The amici states also have compelling interests in maintaining the integrity, independence and impartiality of judges and limiting the negative impacts of fund-raising on the performance of judges. Public distrust of government because of campaign finance issues adversely affects all government officials. In addition, the excessive costs of judicial campaigns substantially affect all states where elections play a role in selection of judges, harming not only public trust in the judiciary, but also the due process rights of litigants appearing before elected judges. Each state joining this brief has a vital interest in (a) preserving the free speech and due process rights of our citizens; (b) preserving the integrity of the judiciary and avoiding the appearance of partiality in judicial offices; (c) reducing corruption and the appearance of corruption in government generally; and (d) assuring public faith and participation in the democratic process. The State of Ohio has established a compelling interest in shielding its judiciary from the appearance of partiality and potential for improper influence which flow from excessive campaign expenditures. The expenditure limitations at issue in this case are narrowly tailored to serve this interest and should have been upheld.

The Court's application of *Buckley* to strike the judicial campaign spending limitations enacted by the Ohio

Supreme Court effectively bars adoption of judicial campaign spending limits regardless of the offered justification. This Court should grant certiorari in light of the enormous consequences to our system of government stemming from this misapplication of *Buckley*.

The Amici submit that the events of the last twenty years reveal that reasonable ceilings on campaign spending are needed to ensure the robust and "unfettered interchange of ideas" that is at the core of the First Amendment. *Buckley v. Valeo*, 424 U.S. at 14, *quoting Roth v. United States*, 354 U.S. 476, 484 (1957). In the last twenty years the amici states have seen marked increases in the amount of campaign expenditures. The amici states are concerned that limits on individual campaign contributions alone do not prevent corruption or the appearance of corruption.

REASONS FOR GRANTING THE WRIT

The Court below refused to consider the unique nature of judicial elections, refused to give credence to the compelling interests offered by the State of Ohio, and refused to even consider the possibility that an interest other than preventing corruption or the appearance of corruption could justify judicial campaign expenditure limitations. The Court essentially held that *Buckley v. Valeo* forever barred the recognition of compelling governmental interests sufficient to justify judicial campaign spending limits, no matter how narrowly tailored those limitations might be. This cannot be a proper application of the law. Especially in an issue of such importance,

which is dependent upon assessments of facts that may change over time, constitutional rules cannot be frozen. Only this Court can correct this misapplication of *Buckley*.

I. STATES HAVE A COMPELLING INTEREST IN MAINTAINING AN UNBIASED AND INDEPENDENT JUDICIARY.

The people in each state "have a legitimate, indeed compelling, interest in maintaining a judiciary fully capable of performing the demanding tasks that judges must perform." *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991) (mandatory retirement age for appointed state judges exempt from Federal Age Discrimination in Employment Act). Restrictions on judicial election spending implicate not only the First Amendment interests of candidates but also the interest in an impartial judiciary which underlie the Due Process Clause.

> The First Amendment analysis by its nature tends to highlight the electoral interests of the judge as a candidate and the citizens as voters. It often fails to recognize that these men and women are candidates to a single end, that of becoming judges, and once judges, the interests of the litigants they serve and the judicial system as a whole should be paramount. Once this is appreciated, the restraints on judicial electioneering can be seen for what they are, due process protections for litigants arguing before the elected judges.

Randall Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics, 1059, 1060 (1996).[2] Even a judge's indirect financial interest in a pending case can violate the Due Process Clause. This Court has found undue risk of bias, for example, where a police court judge received a small amount of each fine, *Tumey v. Ohio*, 273 U.S. 510, 515 (1927), or where the town treasury received traffic fines imposed by a mayor acting as traffic judge, *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 58 (1972). The mere appearance of bias can in some cases create sufficient risk to the right to fair trial to violate due process. *Taylor v. Hayes*, 418 U S. 488, 501 (1974) (requiring trial judge's recusal in attorney contempt case). *See* Scott D. Weiner, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 Harv. C.R.-C.L. L. Rev. 187, 190-191 (1996).

The need for an impartial judiciary is a sufficiently compelling state interest to permit reasonable regulation of judicial campaign speech necessary to achieve that purpose. Thus, judicial candidates can be restricted from commenting on issues likely to come before them as judges. *Stretton v. Disciplinary Board of Supreme Court of Pennsylvania*, 944 F.2d 137, 142 (3rd Cir. 1991); *Ackerson v. Kentucky Judicial Retirement & Removal Commission*, 776 F.Supp. 309, 315 (W.D. Ky. 1991); *Berger v. Supreme Court of Ohio*, 598 F. Supp. 69, 75 (S.D. Ohio 1984), *aff'd*, 861 F.2d 719 (6th Cir. 1988).[3] "The state's interest in ensuring that

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[2] The author, Randall Shepard, is Chief Justice of the Indiana Supreme Court.

[3] Although there are cases striking judicial campaign speech regulations as overly broad, those cases also recognize

judges be and appear to be neither antagonistic nor beholden to any interest, party, or person is entitled to the greatest respect." *Morial v. Judiciary Commission*, 565 F.2d 295, 302 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978) (upholding requirement that judge resign before campaigning for non-judicial office). This interest justifies the imposition of campaign speech restrictions upon judicial candidates which would almost certainly be found unconstitutional if applied to non-judicial candidates. *Stretton*, 944 F.2d at 142.

"The fact that a state chooses to select its judges by popular election . . . does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly." *Stretton v. Disciplinary Board of Supreme Court of Pa.*, 944 F.2d at 142. Federal judges are appointed by the President for life. However, thirty-eight states have judges at some level stand for some form of election, ranging from partisan elections to retention-only elections. American Judicature Society, Judicial Selection in the States (March 1998). "Of the nations' 1,243 state appellate judges, 81.9% stand for election of some type and 47.9% face contestable elections. . . . Of the nations' 8,489 state judges in trial courts of general jurisdiction, 86.9% stand for election of some type and 77.3% face contestable elections. . . . " American Bar Association, Report and Recommendations of the Task Force on Lawyers' Political Contributions, p. 3, n.1 (July 1998). It is the

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that preservation of judicial impartiality is a compelling state interest. *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 227 (7th Cir. 1993); *Beshear v. Butt*, 863 F. Supp. 913 (E.D. Ark. 1994); *J.C.J.D. v. R.J.C.R.*, 803 S.W.2d 953, 956 (Ky. 1991).

prerogative of sovereign states to decide the qualifications for judges and how best to assure the goal of a fully functioning judiciary. *Gregory v. Ashcroft*, 501 U.S. at 472-473. That states make judges accountable to the electorate, either through contested elections or retention elections, does not reduce the compelling need for an impartial judiciary.[4]

The problems arising from high campaign spending in judicial elections differ from those for legislative or executive offices. Most contributions come from lawyers or potential litigants, so the base of contributors is quite small. Champagne, *Judicial Reform in Texas*, 72 Judicature 146, 149 (1988) (study of Texas judicial elections). In a 1989 Pennsylvania Supreme Court race, the winning candidate spent $1,400,000 – $800,000 contributed by law firms. Weiner, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 Harv. C.R.-C.L. L. Rev. at 194. Lawyers and litigants are also the persons most likely affected by the judge's official performance in individual cases. A 1998 study of Texas judicial campaign contributions indicated that forty percent of campaign spending by the seven winning candidates for the Texas Supreme Court in 1994 and 1996 was donated by parties and lawyers having cases before the court and contributors closely linked to them. As a result, in over sixty percent of the opinions issued from 1994 to 1997, at least one of

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[4] While some have suggested that elimination of judicial elections to mimic the federal model would solve the judicial campaign dilemma, this would not be a less restrictive alternative to regulation of judicial campaign speech or spending as it would eliminate that speech altogether.

the seven justices had received a contribution from a contributor closely linked to a party or lawyer in the case. Mark Hansen, *A Run for the Bench*, ABA Journal, Oct. 1998 at 68, 70.

Judicial elections are becoming much more expensive nationwide. ABA Taskforce Report, pp. 13-17. This is true of non-partisan and retention-only elections, as well as partisan elections. *Id.*, p. 16. The most expensive judicial campaign ever was a retention-only election involving three California Supreme Court Justices in which spending exceeded ten million dollars. *Id.* Increased spending occurs at all levels and throughout the country. The median spending in non-partisan elections for the Los Angeles Superior Court jumped from $3,000 in 1976 to $70,000 in 1994. *Id.* Spending for a non-partisan election for one seat on the Kentucky Supreme Court in 1978 was $52,000, but rose to an average of $412,000 for two seats in 1996. *Id.* at 17.

The high cost of judicial elections is itself a critical problem. As the American Bar Association Task Force on Lawyers' Political Contributions concluded, "Of course the greater the sums raised, the greater are all the problems: the pressure on lawyers to contribute, the judges' time and attention that will likely be given to fund-raising, the judges' dependence – or appearance of dependence – on the fund-raisers and the contributors, and the erosion of public confidence." ABA Task Force Report, p. 16. The ABA Task Force did not address the merits of campaign spending limitations because of this pending case. *Id.* at p. 23, n.37. The Task Force did, however, conclude that " . . . the need for reform could not be clearer nor more urgent, given the value we place

on public confidence in the courts, on judges' independence and integrity, and on making the bench attractive to the kinds of people we need as judges." ABA Taskforce Report, p. 17.

Caps on individual campaign contributions do not address the problems created by competition for contributions from two or more special interest groups or segments of the bar. This and the increased use of expensive advertising media are cited as the two most significant factors causing a dramatic increase in the dependency on, and influence of, campaign contributions in judicial elections in the last twenty years. Weiner, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 Harv. C.R.-C.L. L. Rev. at 193. The *Mobile Register* in an editorial dated December 29, 1994, claimed that the "public's estimate of judicial elections was pushed to its lowest point" by a recent state supreme court election. The reason, asserted the paper, was that "Plaintiffs' lawyers on the one side and business interests on the other pour millions of dollars into judicial campaigns to get their respective allies elected to the bench." A *Judicature* article asserted that the Texas Supreme Court, and some lower court, races have seen "campaign finance wars between plaintiff and defense lawyers." Champagne, *Judicial Reform in Texas*, 72 Judicature at 149.

Ohio is not alone in concluding that the high cost of judicial elections is a critical problem. A Pennsylvania Report of the Special Commission to Limit Campaign Expenditures (March 1998) calls for the limitation of judicial campaign expenditures to $1,000,000 for Supreme Court Office, $500,000 for Superior and Commonwealth Court, and $250,000 for the Court of Common Pleas. That

panel, appointed by the Pennsylvania Supreme Court, commissioned polls that showed that ninety percent of Pennsylvania voters believe that "the amount of money spent in elections and campaigns causes many voters to lose a great deal of faith in the political system." *Id.*, p. 13. In Washington State, a commission appointed by the Supreme Court Chief Justice, the Governor, and legislative leaders recently called for shifting from a competitive election to a retention election for judges. A key reason is to reduce the mounting cost of judicial campaigns. The commission recognized that maintaining impartiality is difficult when judges must seek very substantial financial help from lawyers and special interest groups. Report of the Walsh Commission, p. 45 (March 1996).

States and the public reasonably fear that this competitive fundraising spiral can have significant adverse effects on the performance of judges. As shown by the examples above, the extent of contributions from one or more affected interest groups can be very significant. Knowledge of this dependence plus the efforts required to organize a fundraising campaign sufficient to generate upwards of one million dollars for statewide races clearly can adversely affect the performance of the judge.

States have a compelling interest in assuring that the demands of fundraising not drain elected officials of the time and attention necessary to carry out their official duties. Vincent Blasi, *Free Speech and the Widening Gyre of Fund-Raising: Why Campaign Spending Limits May Not Violate the First Amendment After All*, 94 Colum. L. Rev. 1281, 1284-1289 (1994). The increased time spent raising campaign funds is directly related to the high level of campaign spending. Alternative campaign finance reform

methods, such as contribution limits and disclosure requirements, do not prevent this diversion of time and attention. "Candidates facing or fearing tight races will be preoccupied with fund-raising (or voucher raising) under any system that does not restrict total spending." *Id.* at 1284. This harm is clearly not caused by speech, but by the process of collecting campaign dollars. Nor can the impact on candidates' time be mitigated by more speech. *Id.* at 1298-99.

Decisions of the Courts of Appeals for the First and Eighth Circuits, upholding voluntary expenditure limits within a public financing system, have recognized an independent compelling governmental interest in freeing candidates from the rigors of fundraising. *See Rosenstiel v. Rodriguez*, 101 F.3d 1544, 1553 (8th Cir. 1996), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1820 (1997); *Vote Choice Inc. v. DiStefano*, 4 F.3d 26, 39 (1st Cir. 1993). The Court of Appeals for the Eighth Circuit, in upholding the voluntary expenditure limitations in Minnesota's public financing system, found as a matter of "well settled" law the government's compelling interest in seeking "a diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning." *Rosenstiel*, 101 F.3d at 1553, *citing Shrink Mo. Gov't PAC v. Maupin*, 71 F.3d 1422, 1426 (8th Cir. 1995); *Republican Nat'l Committee v. FEC*, 487 F. Supp. 280, 285 (S.D.N.Y) (three-judge court), *aff'd mem.*, 445 U.S. 955 (1980); *but see Russell v. Burris*, 146 F.3d 563, 568 (8th Cir. 1998), *cert. denied*, 67 U.S.L.W. 3332 (Nov. 16, 1998) (indicating that the anti-corruption rationale is only compelling interest thus far recognized by this Court to support campaign spending limits). The

Court of Appeals for the First Circuit, in upholding portions of the Rhode Island public financing system, acknowledged that "the state possesses a valid interest in having candidates accept public financing because such programs . . . free candidates from the pressures of fundraising." *Vote Choice Inc. v. DiStefano*, 4 F.3d at 39.

The Court of Appeals failed to recognize that the State of Ohio has compelling state interests in assuring its citizens the protection of a functioning and impartial judiciary. These interests are different from the interests considered in *Buckley* and are not precluded by that decision.

II. *BUCKLEY V. VALEO*, 424 U.S. 1 (1976) DOES NOT PRECLUDE JUDICIAL RECOGNITION OF COMPELLING GOVERNMENTAL INTERESTS SUFFICIENT TO JUSTIFY SPENDING LIMITATIONS.

Perhaps because this Court in *Buckley* considered only an abstract challenge to campaign spending limitations and the United States did not defend those, the Court found that "no governmental interest that has been suggested is sufficient to justify the restriction on the quantity of political expression imposed by 608(c)'s campaign expenditure limitations." 424 U.S. at 55. As shown above, there are additional compelling and unique state interests protected by judicial campaign spending limits.

The Court's factual assumptions in *Buckley* cannot permanently preclude courts from acknowledging that those assumptions were erroneous or from hearing new factual matters to support campaign spending limitations. "[A] decision of the Court, if, in essence, merely the

determination of a fact, is not entitled in later controversies between other parties, to that sanction which, under the policy of stare decisis, is accorded to the decision of a proposition purely of law. For not only may the decision of the fact have been rendered upon an inadequate presentation of then existing conditions, but the conditions may have changed meanwhile." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1931) (Brandeis, J. dissenting).

Where less restrictive alternatives fail to accomplish the compelling state interest, *stare decisis* does not preclude a state from enacting more burdensome laws necessary to meet the need. *Federal Communications Commission v. League of Women Voters of California*, 468 U.S. 364, 401, n.27 (1984) ("over a century of governmental experience with less restrictive alternatives that proved to be inadequate to maintain the effective operation of government" supported constitutionality of Hatch Act) *describing CSC v. Letter Carriers*, 413 U.S. 548, 557-563 (1973).

Changed factual circumstances provide an appropriate basis for distinguishing a decision of the Supreme Court. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989) ("a precedent becomes more vulnerable as it becomes outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare' "), *quoting Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, concurring). Overruling a prior case is also appropriate where "facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification. . . . " *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992).

III. THERE IS SUFFICIENT DOUBT REGARDING THE SOUNDNESS OF *BUCKLEY* TO MERIT RECONSIDERATION OF THAT DECISION.

To the extent that the Court of Appeals for the Sixth Circuit correctly applied *Buckley* to hold all campaign spending limits unconstitutional, reconsideration of *Buckley* is appropriate. Significant doubt about the soundness of the decision in *Buckley* and the strength of criticism of that decision among legal scholars[5] supports reconsideration. *See Afroyim v. Rusk*, 387 U.S. 253, 255-56 (1967); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 47-49 (1977).

It is particularly inappropriate to read *Buckley* as conclusively adjudicating issues of legislative fact as there was never a trial in *Buckley*. The *per curiam* decisions of the court of appeals and this Court were based on stipulations and offers of proof concerning 28 certified questions of constitutional law. *Buckley v. Valeo*, 519 F.2d 821, 901-904 (D.C. Cir. 1975). Roland Homet, *Fact-Finding in First Amendment Litigation: The Case of Campaign Finance Reform*, 21 Okla. City U. L. Rev. 97, at 99-107 (1996). The United States did not defend the constitutionality of the spending limits. The Brief for the Attorney General as Appellee and for the United States as Amicus Curiae, pp.

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[5] Among critical analyses of *Buckley* are: C. Edwin Baker, *Campaign Expenditures and Free Speech*, 33 Harv. C.R.-C.L.L.Rev. 1 (1998); Peter M. Shane, *Commentary, Back to the Future of the American State: Overruling Buckley v. Valeo and Other Madisonian Steps*, 57 U. Pitt. L. Rev. 443 (Winter 1996); Roland Homet, *Fact-Finding in First Amendment Litigation: The Case of Campaign Finance Reform*, 21 Okla. City. U. L. Rev. 97 (1996).

67-68, 72-73, indeed suggested that expenditure limitations were unconstitutional.

Even in First Amendment cases, the Court accords deference to legislative findings as to harms to be avoided and the remedial measures to be adopted; otherwise, the legislative authority to make judgments to develop policy would be greatly infringed. *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180, 195 (1997) (upholding cable television "must-carry" requirements). Despite the lack of any trial of fact, the decision in *Buckley* gave no deference to legislative judgments as to the need for spending limitations. As Justice White noted in dissent, "The record before us no more supports the conclusion that the communicative efforts of congressional and Presidential candidates will be crippled by the expenditure limitations than it supports the contrary." 424 U.S. at 263.

The results of two decades of application of *Buckley* lend credence to the legislative findings rejected therein and provide a basis for new legislative findings of compelling governmental interests necessitating campaign expenditure limitations. The Court should defer to the Ohio Supreme Court's rulemaking judgment concerning the need for judicial campaign spending limits.

IV. FEDERAL COURT REVIEW OF A REVISED STATE RULE, RATHER THAN THE CURRENT RULE, IMPROPERLY DISCOURAGES STATES FROM CORRECTING RULES WHICH BURDEN THE EXERCISE OF FEDERAL CONSTITUTIONAL RIGHTS.

Canon VII(C)(6)(d), as enacted in 1995, established a $75,000 expenditure limitation for all judicial candidates for a court of common pleas and a $15,000 limitation for campaign expenditure for municipal or county courts. The District Court enjoined enforcement of these limitations, concluding that the challengers would likely succeed in establishing that the canon unconstitutionally infringed on judicial candidate's First Amendment rights. Petition Appendix, A-40. Appeal was taken to the Sixth Circuit Court of Appeals. Prior to the completion of briefing on the appeal, the Ohio Supreme Court amended Canon VII(C)(6)(d), replacing the across-the-board expenditure limitations with a graduated scale of population-based expenditure limitations, thus providing more narrowly tailored spending limitations.

Under these circumstances, where a challenged law is amended after entry of judgment, but prior to resolution of a pending appeal, the appellate court is bound to review the judgment of the district court in light of the amended provision, rather than the law as it stood before the lower court. *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972). The Court of Appeals acknowledged this precedent, indicating that it "could no longer consider the former version of Canon VII(C)(6)" as it [had] recently been revised. App. A-7. The Court then ignored pronouncements of this Court regarding appropriate

alternatives for review of the amended canon[6] and proceeded to order remand to the district court for review of the constitutionality of the new canon while issuing a decision regarding the "appropriateness" of the district court's decision as to the amended canon. App. A-8. The Court's review of the amended canon was directly contrary to this Court's repeated pronouncements requiring an appellate court to judge a case in accordance with the law as it exists at the time of [the appellate] decision. *Tully v. Mobil Oil Corp.*, 455 U.S. 245, 247 (1982); *see also National Treasury Employees' Union v. Von Raab*, 489 U.S. 656, 661 n.1 (1989).

The approach taken by the Court of Appeals strongly discourages states faced with a facial challenge to the constitutionality of a statute from voluntarily correcting potential defects in the statute. If voluntary correction can result in issuance of a negative decision regarding the old statute as well as the preservation of the pending

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[6] Three alternatives are available to an appellate court faced with amendment of a challenged law during the pendency of an appeal. If the amendment so changes the law that the pending controversy is mooted, the lower court decision should be vacated. *Diffenderfer v. Central Baptist Church*, 404 U.S. at 415. If the amendment is such that additional fact-finding is necessary to determine the impact on the pending controversy, a remand to the district court is appropriate. *Fusari v. Steinberg*, 419 U.S. 379, 387-89 (1975). But when the amendment does not moot the controversy or significantly alter the substance of the issues presented on appeal, the appellate court should proceed to review the lower court ruling in light of the amended law. *Florida General Contractors v. Jacksonville*, 508 U.S. 656, 661-63, n.3 (1993); *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 288-89 (1982).

challenge as to the new statute, little can be gained by the correction. In fact, much may be lost. The intervening amendment may be viewed as a concession that the statute as initially challenged was faulty. More importantly, the appellate decision will stand as precedent limiting the lower court's consideration of the revised statute. The Court of Appeals' review of the amended canon is particularly harmful in this case in that the Court's decision represents the first reported federal appellate court decision addressing the constitutionality of judicial campaign spending limitations. The decision should not be allowed to stand as guidance for other states considering enactment of similar limitations.

CONCLUSION

The *amici* states urge this Court to reevaluate campaign expenditure limits in light of the facts and compelling interests presented in this case which were not raised in *Buckley*. We submit that *Buckley* does not and should not stand as a bar to Ohio's judicial campaign spending limits and request the Court to reverse the decision below.

Respectfully submitted,

THOMAS J. MILLER
Iowa Attorney General
ELIZABETH M. OSENBAUGH*
**Counsel of Record*
Solicitor General
Hoover Building, 2nd Floor
Des Moines, IA 50319
(515) 281-3349
Counsel for Amici Curiae States

(8)

Supreme Court, U.S.
FILED
DEC 16 1998
OFFICE OF THE CLERK

No. 98-737

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1998

JONATHAN W. MARSHALL, et al.,

Petitioners,

v.

RONALD SUSTER, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

BETTY D. MONTGOMERY
Attorney General
MICHAEL J. RENNER
Chief Counsel
Counsel of Record
ELISE W. PORTER
Office of the Attorney General
30 East Broad Street, 17th Flr.
Columbus, Ohio 43215-3428
(614) 644-8903
(614) 466-5087 (fax)

Counsel for Petitioners

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REASONS FOR GRANTING THE WRIT

Respondents, as well as the court below, have ignored one of the fundamental principles of American liberty: judicial impartiality. Without the assurance of neutrality and impartiality of judicial officers, the law as we know it would cease to exist. Interpretation of the law would go to the highest bidder, and the judiciary will have succumbed to the political pressures of the day.

A compelling, and indeed paramount state interest in the impartiality of the judiciary must be recognized if state laws are to be administered according to consistent, neutral principles. Otherwise, elected judges will not be valued by state citizens as impartial arbiters of the law, but viewed as demeaning the rule of law in exchange for political power.

This case presents a unique opportunity for the Court to assure the impartiality and the perception of impartiality of the elected judiciary in Ohio, and around the country. The Court must take this case to recognize the compelling state interest in a neutral and unbiased state judiciary, and to hold that such an interest can justify limits on expenditures in judicial campaigns.

I. THE SIXTH CIRCUIT'S FIRST ERROR IS IN THE *SIMULTANEOUS* REVIEW OF THE FORMER CANON AND REMAND OF THE AMENDED CANON

The court below made a fundamental error in remanding the amendment to Canon VII(C)(6)(a) for a "full review" and *simultaneously* reviewing and rejecting the former version of that Canon. Respondents' briefs in opposition seek to separately justify the two actions of the

Sixth Circuit. *See*, Brief for Respondents Boyko, Kane and Saferin, ("Boyko brief") p. 9-13, 13-14; Brief for Respondents Suster & Cleary ("Suster brief") p 7-9. By handling the issues separately, Respondents attempt to make the remand and review each seem reasonable. Indeed, either action *alone*, given the proper circumstances, might have been reasonable; the lower court's *simultaneous* review and remand is what renders its holding fundamentally erroneous.

If, during the course of litigation involving a facial challenge to a law, the law undergoes an amendment, the federal courts are enjoined to review *only* the new law. *Diffenderfer v. Central Baptist Church*, 404 U.S. 412, 414 (1972). As explained in the Petition, the courts have consistently exercised one of three options: (1) if the amendment moots the appeal, the lower court decision is vacated and the case dismissed; (2) if the amendment requires additional findings of fact or legal analysis, the case is sometimes remanded for further review; (3) if the amendment does not make substantial changes, the appellate court will review the law as it now stands. *See*, Petition, p. 9. Review of the former law is not an option.

The Sixth Circuit, in its attempt to "split the baby" has instead created a split in the circuits that must be resolved. The holding below contradicts a long line of cases in the circuit courts, holding that the court must review the new law, and exercise one of the options outlined above. *See*, Petition, p. 10-11. This line of cases is best represented by *Rosenstiel v. Rodriguez*, 101 F.3d 1544 (8th Cir 1996). Respondent's main argument against review of the new law is that the amendment came after the main briefing was

complete.[1] However, in *Rosenstiel*, a case virtually identical to this one, the Eighth Circuit reviewed the new law, even though the law was amended after both briefing and oral argument. Respondents can distinguish *Rosenstiel* only on the basis that the parties there did not want remand. Boyko brief, p. 11. In this case, no party requested remand; the court remanded *sua sponte*. If the court below wished to "protect" the Respondents from potential discipline, *see* Suster brief, p. 8, it had two options: to review the new law, and the injunction, or remand both the injunction and the new law for review.

Above all, a simultaneous review of the former law and remand of the amended law results in an untenable procedural posture. Respondents argue that the remand is necessary for a "full development of the factual record and the legal arguments of the parties." Boyko brief, p. 10-11. However, such a "full development" has been forever precluded by the court's simultaneous determination that the former Canon is unconstitutional. Having determined that *Buckley v. Valeo*, 424 U.S. 1 (1976) precludes *any* caps on campaign spending, the Sixth Circuit has already decided any legal arguments with regard to compelling state interest for either Canon. Factual findings with regard to the amended Canon would be a vain act, because under the Sixth Circuit's analysis, the district court will never reach the issue most affected by a factual development: narrow tailoring.

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[1] Contrary to assertions by Respondents Boyko, Kane and Saferin, the amendment was brought to their attention and to the attention of the Sixth Circuit in Petitioner's reply brief before that court. In addition, the motion dealing with this issue came months before oral argument, and therefore afforded Respondents more than adequate time to respond.

In addition, as argued by Amici States, the actions of the Sixth Circuit put all States in the Circuit in a difficult position. The States are strongly discouraged from improving a law through amendment when there is pending litigation involving that law, for fear of a procedural mess similar to the one here.

Simply put, the Sixth Circuit has created an impossible situation for the district court, and produced a split in the circuits on the issue of the review of an amended law and the procedural options available when a law has been amended. The Court must take this case in order to resolve the split, and review the law as it now stands. At the least, the Court should vacate the Sixth Circuit's opinion and allow the district court a clean slate upon which to review the new Canon.

II. THE SIXTH CIRCUIT ERRED IN HOLDING THAT LIMITS ON CAMPAIGN SPENDING ARE FOREVER PRECLUDED BY *BUCKLEY*

Contrary to the assertions of all Respondents, *Buckley* held only that campaign spending limits for federal *legislative and executive* campaigns were not narrowly tailored to serve the only governmental interest put forward in that case: the prevention of corruption and the appearance of corruption. *See*, Boyko brief, p. 15-16; Suster brief, p. 10-11. This Court has always left open the possibility that other compelling interests might exist that would justify limits on campaign speech, perhaps including limits on spending. *FEC v. NC-PAC* 470 U.S. 480, 496-497 (1985).

Respondents stridently insist that there is no case from this Court or the Sixth Circuit which expands the list of compelling state interests justifying limits on political speech.

See, Suster brief p. 11. That is the very reason Petitioners are before the Court today. If there were a case dealing with judicial elections, or otherwise expanding the list of compelling state interests, the need for a grant of certiorari in this case would be far less compelling.

Respondents also argue that the Court need not examine the proposed compelling state interest because limits on campaign spending are not the least restrictive means of achieving that interest. Boyko brief, p. 16-17. Respondents have the analysis exactly backwards. Before arguments can be made about least restrictive means, the exact nature of the compelling state interest must be determined.

Respondents quote extensively from *Buckley* to emphasize their point that judicial elections are amenable to the same restrictions as those for legislative or executive office. *See*, Suster brief p. 14-16. However, these quotes merely serve to illustrate the stark differences. In a legislative or executive election, a restriction on spending may "restrict the number of issues discussed" and "the depth of their exploration." In a judicial campaign, the number of issues is already severely restricted. The judicial candidate cannot discuss how he would vote on a particular case, or even his views on a subject that may come before him.

Similarly, an assurance of the "unfettered interchange of ideas for the bringing about of political and social changes desired by the people," is exactly contrary to the nature of a judicial campaign. Political and social changes desired by the people are the province of the legislature and executive, decidedly not the province of the judiciary. Restricting such an "unfettered exchange" in a judicial election is not only appropriate, but desirable. The public has a right to an elected judiciary unfettered by the pre-election partiality

which is the natural result of unlimited exchange and debate of ideas regarding social policy. We should not permit a judge to be torn between a decision based on the law and facts and a decision made in fulfillment of a campaign promise.

In short, Respondents have pointed out the two most significant reasons for the Court to take this case: (1) to examine judicial elections for the first time, and determine whether the list of compelling state interests justifying limits on political speech should be expanded; and (2) to determine whether the compelling state interest of the preservation of impartiality and the appearance of impartiality justifies limits on campaign spending *in judicial elections*.

CONCLUSION

For the foregoing reasons, the petitioners respectfully request the Court to grant the writ.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General

MICHAEL J. RENNER
Chief Counsel
ELISE PORTER
Assistant Attorney General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
(614) 644-8903
(614) 466-5087 (fax)

December 16, 1998.